Office of Command Counsel Newsletter

December 1997, Volume 97-6

REDS Comes to AMC

Pilot sites chosen to test ADR for Workplace Disputes

AMC has been a leader in designing dispute resolution processes for several substantive areas of practice to include the AMC-level Protest Program and Partnering.

We are pleased to announce that we are testing an ADR program for workplace disputes. Entitled **REDS** - Resolving Employment Disputes Swiftly, three pilot programs will run at Tank-automotive and Armaments Command (TACOM), Army Research Laboratory (ARL), and Anniston Army Depot (ANAD).

During the week of 3 November, three-person ADR Teams representing test-site EEO, CPO and Legal staffs met at HQ AMC to design program procedures and an information brochure.

A special thanks to **Jean Wiley Cozart**, AMC Director of Equal Opportunity for taking the initiative and organizing the effort. **Cassandra Johnson**, DSN 767-8050, is the AMCCC POC. Counsel from the test sites who are members of their installation ADR Team are **Paul Vitrano** (TACOM), **Sam Shelton** (ARL) and **George Worman (ANAD). Steve Klatsky**, DSN 767-2304, is participating as ADR advisor.

Many of you volunteered your command to serve as a test site. As with all ADR initiatives, a basic tenet is to start small and test a program. That's what we're doing, so we hope you understand. As the test program progresses you will be provided information and be given an opportunity to comment.

In short, we believe that ADR offers several advantages over traditional dispute resolution processes in handling employment issues. In most situations, the traditional complaint and grievance procedures do not focus on the continuing employment relationship. Often, the formal, adversarial process makes the employer-employee relationship worse. Additionally, ADR offers an expedited resolution, less costly in both time and money. ADR encourages the parties to communicate with each other, and to formulate a resolution they design; one that concentrates on healing the relationship and moving forward.

In This Issue:

What Are Government Functions? — An Inherently Difficult Call to Make

As we go to press, MSC's are actively engaged in responding to a data call concerning the identification of missions and functions that are inherently governmental.

Inherently governmental functions are those functions that are intimately related to the public interest and require either the exercise of discretion in applying government authority, or the making of value judgments in government decision making.

Inherently government functions normally fall into two categories: the act of governing (i.e., the discretionary exercise of government authority) and monetary transactions and entitlements.

Inherently government functions determinations are a matter of policy not law. The HQ, AMC functional directors are responsible for ensuring consistent analysis within their functional areas. Conclusions must be made on a case by case basis considering the totality of the circumstances, such as whether the function involves discretionary activities or value judgments that commit the government to a course of action in a way that significantly affects the public interest.

Importantly, inherently governmental functions cannot be contracted out and must be performed by government employees.

Deputy Command Counsel Nick Femino, DSN 767-8032, is the leader of the team addressing this issue. Diane Travers, DSN 767-7571, prepared a Point Paper on the subject for the ESC (Encl 1).

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

ESC Discussions on Acquisition Law

Contracting Out, A-76, Proprietary Data, Authorization Bill & more...

At the quarterly Executive Steering Committee meeting — Commander's Conference, the Office of Command Counsel distributes point papers on several important topics that warrant highlighting.

During the week of 17 November, the ESC was held at White Sands Missile Range. Point papers were distributed on the following subjects:

Protecting Contractor Proprietary Data, highlighting proprietary data protection and use considerations, POC **Ed Stolarun**, DSN 767-8051 (Encl 2).

A-76 Cost Studies, providing information about when cost studies are required under OMB Circular A-76, POC **Dave Harrington**, DSN 767-7570 (Encl 3).

Common Threads to AMC Business Process Re-engineering Initiatives, addressing systemic issues involved in several important initiatives, POC **Elizabeth Buchanan**, DSN 767-7572 (Encl 4).

Official Representation Funds, providing needed guidance on proper use of these funds as well as a list of prohibitions, POC **LTC Paul Hoburg**, DSN 767-2552 (Encl 5).

FY 98 DOD Authorization Bill, summarizing highlights in HR 1119 as presented to the President on 6 Nov 97, POC **Diane Travers**, DSN 767-7571 (Encl 6).

An additional ESC Point Paper will be found in the Ethics Focus.

A special thanks to **LTC Paul Hoburg** who has the task of orchestrating and administering the effort, one that the MSC Commanders truly appreciate, as they often comment that these materials are very useful. ©

List of Enclosures

OOPS!

In Newsletter 97-5 TACOM counsel **Kuhn** was renamed without his permission. Of course, he is still known as **David**. Sorry for the error.

Acquisition Law Focus

Fun with FACA

CBDCOM's Lisa Simon, DSN 584-1298, provides an article on a proposed amendment to the Federal Advisory Committee Act (FACA) which would exempt the National Academy of Sciences ("NAS") and its subordinate committees from coverage under FACA. However, even though the NAS may now be exempt, a review of the proposal indicates the NAS may be required to make committee proceedings more open to the public. The proposed amendment is currently awaiting the President's signature. If enacted, the law's requirements will apply retroactively to all NAS committees formed after 1972.

We foresee two potential impacts on AMC. First, it removes the spector of FACA litigation from NAS committees. This would end a hotly contested issue that has been debated in the courts. Second, consulting agencies may be precluded from relying on NAS advice if the NAS does not comply with the amendment's requirements. This legislation is in response to: Animal Legal Defense Fund v. Shalala, 104 F.3d 424 (D.C. Cir.1997), writ of certiorari denied November 4, 1997 (Encl 8) ©

A-76 Cost Comparisons & Contracting Out

HQ, AMC Counsel Dave Harrington, DSN 767-7570, provides an overview addressing when cost studies are required under OMB Circular A-76 rules concerning Contracting Out (Encl 3).

A commercial activity is an activity that can be obtained from a commercial source. Inherently Government functions, which involve the exercise of discretion in applying Government authority or use of value judgment in making decisions for the Government, are not commercial activities, and are thus not subject to OMB Circular A-76 or its supplemental handbook.

Under current rules contained in A-76 and its Revised Supplemental Handbook, several functions may be converted to contract without performance of a cost comparison:

o Activities with 11 or more full time equivalent employees (FTEs) if fair and reasonable prices can be obtained through competitive award, and all directly affected employees serving on permanent appointments are reassigned to other comparable positions for which they are qualified.

o Activities performed by uniformed military personnel if the contracting officer determines that fair and reasonable prices can be obtained from commercial sources.

Other cost comparison exemptions exist when converting the activity to or from in house such as:

o National defense and national intelligence security.

o Activities where there is no satisfactory commercial source. All reasonable efforts (in compliance with FAR) must be made to identify available sources.

o Activities performed by 10 or fewer full time equivalent employees(FTEs). if the contracting officer determines that offerors will provide required levels of service at fair and reasonable prices.

o Activities for which a waiver of cost comparison requirementsis approved by the ASA(IL&E). The waiver must be based on a determination that conversion will result in a significant financial or service quality improvement without reducing significantly the level or quality of future competition.

o Functions at installations scheduled for closure on a date certain (BRAC). ©

Acquisition Law Focus

COMMON THREADS IN AMC BUSINESS PRACTICE PROGRAMS & INITIATIVES

HQ, AMC's Elizabeth Buchanan, DSN 767-7572, provides information on systemic issues common to AMC's business process re-engineering initiatives.

AMC has several such ongoing programs and projects including the Apache Life Cycle Management Pilot, the M109 Family of Vehicles Life Cycle Management Pilot, and CECOM's Logistics Automation Privatization Pilot.

These initiatives are still in early stages, but some common threads are appearing, including:

o OMB Circular A-76 cost comparison requirements apply unless there is an applicable exemption, waiver, or the program meets the requirements of privatization. Privatization requires that the government convert a public function to private control and ownership. Examples include utilities and housing.

o Competition in Contracting Act (CICA) requirements apply unless a sole source justification, such as proprietary information, exists. In addition, to the extent that requirements which have been accomplished by small businesses are "bundled together" for efficiency, we must be prepared to document the government need for the efficiency and protect small business participation through incentives and evaluation criteria.

o Restrictions on contracting out depot maintenance apply to those initiatives which impact depot maintenance. Partnering arrangements with our depots and industry will assist in achieving objectives.

o The larger initiatives generate significant political interest. Extra time must be built into initiative schedules to provide for the required briefings.

o All of the larger initiatives have significant potential impact on readiness and on Army financial management. To allow for exploration and resolution of these issues, formalized General Officer Steering Committees with subordinate Integrated ProcessTeams have been formed. This process has been very successful in raising and resolving very complex issues impacting Army-wide processes (Encl 4). ©

GAO & Non-Procurement Instruments

TACOM-ARDEC's Denise Scott, DSN 880-6585, provides an excellent paper addressing GAO treatment of protests regarding award of cooperative agreements such as grants, other transactions and cooperative research and development agreements (Encl 7).

The general rule is that GAO will not review protests regarding nonprocurement instruments, primarily because they do not involve award of a "contract."

The GAO will consider a protest that alleges an agency improperly used a nonprocurement instrument where a "procurement contract" is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. See, Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD 451.

Finally, although the GAO will explore whether or not an agency properly used a nonprocurement instrument as opposed to a contract, it has refused to consider the pure issue of whether or not the correct nonprocurement instrument was used, Energy Conversion Devices, Inc., B-260514, June 16, 1995. ©

Employment Law Focus

HIGH COURT TO RULE ON EMPLOYER LIABILITY

Ruling in Sexual Harassment Case to Clarify the Law

The Supreme Court has agreed to decide when an employer can be held liable for a supervisor's sexual harassment of a lower-level employee.

Under the 1986 Supreme Court decision of Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986), an employer can not automatically be held accountable regardless of the circumstances. In the absence of guidance, lower courts have focused on a variety of factors such as whether senior management knew or should have known about the hostile behavior and whether the supervisor was in position to exploit authority.

In Faragher v. Boca Raton, No. 97-282, a federal district court in Miami found the city liable for the unwanted touching of a female lifeguard by two supervisors, deciding that the city "should have known" about the behavior by conducting a proper investigation. On appeal, the 11th Circuit Court of Appeals overruled the lower court, holding that the city should not be held liable for the unauthorized misdeeds of supervisory employees, ©©

Man Sexually Harassed by Female Co-Worker

A common question raised during sexual harassment training is whether there are examples of a woman sexually harassing a man. In Cerullo v. Cohen, DC EVA, No. 97-69-A, Oct 8, 1997, a federal jury awarded $850,000 to a Defense Intelligence Agency security officer who claimed that he was sexually harassed by a female secretary who routinely used vulgar, sexually explicit language, and then retaliated against him for complaining. ©©

Health Problems May Not Justify *Long* Absence

Prolonged absence with no foreseeable end can provide just cause for an employee's removal even when the absence is excused for poor health, if the absence constitutes "a burden which no employer can efficiently endure," so says the MSPB in Allen v. Department of Army, No. SF-0752-96-0050-I2 (Oct 3, 1997).

The criteria for taking an action based on excessive absence were met: (1) he was absent for compelling reasons beyond his control so that agency approval was immaterial; (2) he was absent for almost seven months, and the agency warned him that failure to report for duty could result in disciplinary action; and (3) the agency needed an employee to fill the appellant's position.

The factors used by the Board originally were raised in Rhodes v. Department of Interior, 21 MSPR 193 (1984), 770 F.2d 182 (Fed Cir. 1985).

©©

Employment Law Focus

Reprimand *NOT* Removal For False 171

In Perez v. USPS, 97 FMSR 5314, Sept 9, 1987 the agency removed the appellant, charging that he falsified his employment application when he failed to report that he had been convicted of "conspiracy to burglarize." The AJ found that the agency proved its charge and that removal was a reasonable penalty. On review, the Board found that the penalty of removal exceeded the bounds of reasonableness. The Board acknowledged that, in most cases involving falsification of employment documents, the Board has expressly declined to consider mitigating factors, but the Board rejected a per se rule that removal is always warranted where an employee has falsified his or her employment application. The Board noted that the appellant in this case had 15 years of federal service, 11 years of which were with the agency, and the agency had not shown or claimed he committed any offense during his employment. Further, while the agency initially charged that the appellant falsified his employment application when he failed to report that he had been convicted of "conspiracy to burglarize," it was later discovered that the underlying criminal charge was actually "willful failure to appear." Since the appellant had falsified his employment application, however, the Board found that his employment records should reflect the misconduct, but the Board concluded that the removal should be mitigated to a written reprimand. In view of the mitigating factors, particularly the length of time that had elapsed with no further misconduct, a suspension or demotion would have been punitive rather than rehabilitative.

No Union Rep in this Interview

In FLRA v. US DOJ, 97 FLRR 1-8009, Sept 25, 1997, the Second Circuit overturned a FLRA decision, holding that under the circumstances in the case, six bargaining unit employees were not entitled to union representation during their investigative interviews. In the opinion of the Court, the critical inquiry is whether the investigation concerned matters within the scope of collective bargaining.

In the instant case, the focus of the investigation of some of the employees was whether the employees had accepted bribes. The court considered this to be outside the scope of collective bargaining. Several other employees were questioned about violations of the agency's policy prohibiting the purchase or possession of personal firearms. None of the parties to the case had suggested that the issue was within the scope of collective bargaining. Therefore, none of the employees were entitled to union representation during their examination.

Employment Law Focus

Leak Violates Confidentiality

Confidentiality provisions in settlement agreements are difficult to enforce. Counsel often tries to avoid these provisions because of the possibility that a violation will re-open a case.

In Thomas v. HUD, 97 FMSR 7023 (Sept 8, 1997), the Federal Circuit concluded that the agency materially breached the confidentiality provisions of the settlement agreement. The agency demoted the petitioner based on charges of mismanagement and abuse of supervisory authority. The petitioner appealed, and the parties entered into a settlement agreement, which included a Memorandum of Understanding (MOU) outlining the petitioner's requirements regarding confidentiality. Subsequently, when the agency was contacted with an inquiry by a potential employer, an agency employee stated that there had been some problems and that the petitioner had been the subject of an Inspector General matter. The petitioner contended that the agency breached the agreement, and he sought to withdraw his resignation and to rescind both the settlement agreement and the MOU. The AJ found that the agency did not materially breach the MOU and the MSPB affirmed. On appeal, the Court held that the agency clearly breached the confidentiality provisions of the MOU and further held that the agency's breach was a material one, a matter of vital importance that went to the essence of the contract. The Court stated that, when the leak comes from a responsible official inside the agency in response to an inevitable inquiry from a potential employer, the agency that willingly entered into such an arrangement must be held responsible. The Court concluded that, because the agency breached the agreement, the petitioner was discharged from his contractual duty to resign. Because the agency denied his attempt to withdraw his resignation, the resignation became an involuntary one and the agency's action constituted a removal. Since the Board had dismissed the appeal on the grounds of a voluntary resignation, the Court remanded the matter to the Board for further action. ©

BEWARE of Alert Copyright Owners

Bill Medsger, DSN 767-2556, Chief, Intellectual Property Division, provided the ESC with guidance on preventing copyright infringement (Encl 9).

Army policy is to respect the rights of private copyright owners. Army Regulation 27-60 states that copyrighted works will not be reproduced, distributed, or publicly performed without the permission of the copyright owner. Exceptions to this policy are allowed only if use is permitted under the copyright laws or the use is required to meet an immediate mission-essential need for which nonconforming alternatives are unavailable or unsatisfactory.

Caution must be exercised to ensure that AMC brochures, posters, videos, software and Internet homepages do not include copyrighted material unless advanced permission has been obtained from the copyright owner. Identifying copyrighted material is not always easy - a work may be copyrighted even though it does not contain a copyright notice. Accordingly, it is imperative to know the source of all materials before they are used.

Environmental Law Focus

EPA Is Coming to Inspect

Compliance with EPCRA

The Environmental Protection Agency (EPA) Federal Facilities Enforcement Office tasked EPA regional personnel to conduct Emergency Planning and Community Right-To -Know Act (EPCRA) inspections of federal facilities. Executive Order 12856 authorizes EPA to conduct reviews and inspections of federal facilities to ascertain compliance with EPCRA and Pollution Prevention Act requirements. EPA cannot take enforcement actions (fines, civil or criminal penalties) as provided in EPCRA against federal agencies that fail to comply with applicable EPCRA sections. However, EPA has outlined procedures to be followed if a facility is found to be out of compliance with EPCRA. DOD has issued guidance on complying with these EPA inspection procedures (Encl 10). This guidance document can also be obtained from DENIX.

Get the Lead Out -- Well, Maybe

The issue of whether and to what extent lead-based paint contamination should be remediated at DoD BRAC sites continues to be a highly controversial issues, which has arisen at several of our BRAC installations. DoD and EPA continue to hold discussions to arrive at a consensus approach. A good article on the subject, Does CERCLA Regulate DOD Residential Lead-Based Paint? by an Air Force environmental attorney, Thomas F. Zimmerman, appears in the Autumn 1997 issue of the *Federal Facilities Environmental Journal*. Any lead based paint issues at AMC BRAC installations should be discussed with **MAJ Mike Stump,** DSN 767-8049 and with **Colleen A. Rathbun**, Army Environmental Center (AEC), (410) 671-1551.

The President Speaks: Environmental Executive Orders

More and more our environmental obligations, goals, and requirements are established by Executive Orders, issued by the President, rather than Congressional mandates. An inquiry from one of our installation attorneys prompted us to compile a list of some of the more recent or well known environmental Executive Orders, (Encl 11) POC **Bob Lingo,**

Latest ELD Bulletins

ELD Bulletins for October and November 97 are provided (Encl 12,13) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version.

Environmental Law Focus

AMC Environmental Council Looks to the Future!

On 2 December 1997, the AMC Environmental and Legal Offices conducted their second AMC Environmental Council conference call. During the conference call, HQ AMC and MSC environmental and legal personnel discussed a broad variety of issues. As part of the AMC Environmental Council, the following initiatives are being developed: (1) environmental update video conferences, (2) an Environmental Quality Control Committee training video, (3) an installation self-audit pilot program, and (4) a guide on the preparation of real estate environmental assessments. In the future, the AMC Environmental Council will explore having AMC installations participate in the EPA Environmental management Review (EMR) program and Environmental Leadership Program (ELP). Excerpts of EPA fact sheets relating to the EMR and ELP programs are provided as Encls 14 and 15 .

Storing Non-DoD Hazardous Material

Section 343 of the new FY 98 National Defense Authorization Act, PL 105-85, amended 10 U.S.C. Section 2692 to clarify or add new exceptions to the prohibition against DOD storage or disposal of toxic or hazardous material that is not owned by the Department.

The Committee report indicates that the provisions were enacted to ensure that the DOD has appropriate authority to control munitions stored or disposed of in connection with; (1) storage of explosive material in conjunction with space launch programs; (2) storage of member personal property, such as guns, ammunition, and related material; (3) storage of allied/foreign munitions during joint testing, exercises or coalition warfare; (4) storage of explosives and hazardous materials in support of other U.S. government agencies, to include State and local law enforcement agencies; (5) storage of contractor owned explosive materials when performing a service for the benefit of the U.S. Government; and (6) storage of commercial explosives on DoD installations participating in full or partial privatization. The amendment may be particularly important with relation to BRAC and other commercial leases or facility contracts. For further information, contact **Bob Lingo**, DSN 767-8082.

EO Sets DA Energy and H^2O Goals

The Energy Policy and Conservation Act and Executive Order 12902 set goals for reduction of federal energy and water consumption. For example, the latter sets a goal of reducing energy consumption by 30 percent by the year 2005 and mandates "cost effective" water conservation projects. What contracting and engineering resources are available for your installation to meet these goals? Included is a paper by **Donna K. Harvey**, an OTJAG DAC written as a JAG Graduate Course student: Water Conservation Measures at Army Installations (Encl 16).

Ethics Focus

Side by Side: Contractor & Civilian

Mike Wentink, DSN 767-8003, supplied a Point Paper for the ESC on the sensitive issues related to contractor employees being in the workplace, working with government workers (Encl 17).

Contractor employees are indeed different from Federal employees, even those contractor employees who work on a daily basis in and around the Federal workplace. One major difference is that the conflicts of interest criminal laws do not apply to contractor employees (except for the bribery statute), nor do the *Standards of Ethical Conduct for Employees of the Executive Branch* or the DoD *Joint Ethics Regulation* apply to them.

Contractor employees and their workspace should be clearly identified to ensure that Federal employees and the public know that they are not Federal employees to avoid inadvertent unethical conduct in addition to other issues, such as illegal personal services, claims for services provided beyond that required by the contract, and misunderstandings about fiduciary responsibilities.

There are many important issues to keep in mind, some of which include gifts, protecting information and employment overtures.

GIFTS

Concerning the issue of gifts, remember that contractors and their employees are "outside sources." They should not be solicited for contributions to gifts to departing or retiring Army employees. The rules governing gifts between Army employees and those offered by a contractor or its employees to an Army employee are very different. In an appropriate case, an Army employee may accept a $300 framed print from the employees in his or her organization, but could never accept that gift from the contractor employees who support his or her organization.

INFORMATION EXCHANGE

Exchange of information between government and contractor employees are regulated by a host of rules, depending on the specific type of information.

Numerous statutes protect the release of procurement information, trade secrets, other confidential information and classified information. In addition, the *Standards of Ethical Conduct* prohibit using or allowing the use of, nonpublic information for private interests. As Army employees, we must be very circumspect as to whom we release nonpublic information (i.e., need to know). But, we must be particularly vigilant when we are discussing sensitive matters with and around contractor employees.

FUTURE EMPLOYMENT

Any discussion about future employment between an Army employee and a contractor employee, whoever initiates it, might require special reports depending on the situation. For sure, if the Army employee initiates the inquiry or wishes to pursue it, the Army employee is automatically disqualified from participating in official matters affecting the contractor and must issue a written notice of this disqualification.

As AMC reshapes, this issue will be a growing challenge to AMC Ethics Counsel.

Ethics Focus

Ethics and MSPB:
Law, Literature and History

AMC Counsel Mike Wentink, DSN 767-8003, offers an interesting quote on MSPB case law treatment of ethics issues. The paper was prepared by Stuart Rick, Deputy General Counsel, Office of Government Ethics.

It is always rare to find examples of the relationship between law, literature and history. How about this one from the pre-Civil Service Reform Act case of Heffron v. U.S., 405 F.2d 1307, 1312-13 (Ct.Cl. 1969):

"In the days of Rameses I, we suppose, the one-way flow of gifts to those deputized to administer government affairs, from those obliged to do business with them, already was an ancient institution. Of course, the impartiality of the donees was in theory not impaired. That would be bribery, of which perish the thought. In many cultures the esteem and love of the citizen for the official was expected to be so large and dependable, it was relied on for the latter's subsistence, no salary or a nominal one only being provided. Sometimes incumbents even had to purchase their offices. That is, perhaps, the normal way to do things. Here in the United States we undertake to maintain an exception. The Congress appropriates funds to provide what it deems adequate salaries, frequently adjusted, for those who execute its laws, and on the other hand, the effort is made to restrict the citizenry to expressing its good will towards them in tokens other than money and articles of value. It may well be anticipated, however, that the smallest leak in the dike will swiftly widen, and the old river of gratuities will again flow in the old way. Human nature will reassert itself. It may not be unreasonable, therefore, to believe that what is required is a combination of emphatic warnings and drastic penalties. If at times, as here, this results in tragically wrecking an honorable career for an infraction apparently not of the gravest, this is part of the price that must be paid to maintain the respect and the self-respect of our Government."

Can you think of a better statement about the relationship between ethics and behavior of public officials?

Personnel Changes Proposed for DOD

Reform Initiatives will Free $$$$ for Weapons Modernization

On November 10 Defense Secretary William Cohen announced plans to reduce significantly the Department of Defense's headquarters workforce and to open substantial numbers of commercial activities currently performed by DOD in public-private competition under Office of Management and Budget Circular A-76.

These changes are part of the plan developed by the Defense Reform Task Force to help DOD find ways to overhaul its organization and business practices, to free money to fund long-deferred weapons modernization. *Defense Reform Initiative: The Business Strategy for Defense in the 21st Century* is a 78-page plan outlining reform in consolidating organizations, reducing staff, increasing public-private competition, eliminating excess infrastructure, and reengineering defense support activities.

Ethics Focus

Don't be Misled by Lack of Anti-Lobbying Act Prosecutions

The Anti-Lobbying Act, 18 U.S.C. 1913, prohibits officers and employees of the executive branch from engaging in certain forms of lobbying. If applied according to its literal terms, section 1913 would have extraordinary breadth, and it has long been recognized that the statute, if so applied, might be unconstitutional. The Office of Legal Counsel has interpreted the statute in light of its underlying purpose "to restrict the use of appropriated funds for large-scale, high-expenditure campaigns specifically urging private recipients to contact Members of Congress about pending legislative matters on behalf of an Administration position." Memorandum for **Dick Thornburgh**, Attorney General, from **William P. Barr**, Assistant Attorney General, Office of Legal Counsel, "Constraints Imposed by 18 U.S.C. ' 1913 on Lobbying Efforts," 13 Op. O.L.C. 361, 365 (1989) (prelim. print)(citation and footnote omitted)("1989 Barr Opinion"). Although there has never been a criminal prosecution under the Act since its adoption in 1919, the Criminal Division and its Public Integrity Section have frequently construed the Act in the context of particular referrals. The principles that the Criminal Division has developed over time provide guidance to the meaning of the statute that is necessary in order for the Act to provide reasonably ascertainable guidance to those to whom it applies.

Enclosure 18 contains additional information including a list of permissible and prohibited lobbying activities.

Before You Participate - Fundraising Activity Rules

DoD Officials often receive invitations from various organizations requesting their participation in certain events, such as serving as chairs, attending, or making speeches. These invitations are further complicated when the events are designed to raise funds on behalf of the organization or to benefit a charitable entity. The DoD General Counsel provides guidance on analyzing those invitations under OGE and JER requirements. The paper discusses the rules governing the acceptance of free attendance at events for which there are normally charges.

Unless authorized, DOD officials may not "participate in fundraising in an official capacity." Fundraising includes "active and visible participation in the promotion, production, or presentation of "an event at which any portion of the cost may be taken as a charitable tax deduction. Participation includes serving as an honorary chairperson, sitting at a head table, or standing in a reception line. In accordance with the JER, a DoD official may not "officially endorse or appear to endorse" fundraising for any non-Federal organization, with certain specified exceptions.

Enclosure 19 highlights additional important provisions.

TEAMING FOR SUCCESS

AT THE OFFICE OF COMMAND COUNSEL

As part of the Continuing Legal Education Program theme for 1997, "Teaming for Success", the Office of Command Counsel took two days off from regular operations to participate in a two-day training session on Teaming.

Dr. Norma Barr, Barr & Barr Communication Consultants, the leader of the group, focused our attention on the different communication styles as revealed by the Myers-Briggs Type Indicator, the elements of Teamwork, Leadership and Power strategies. The group candidly discussed relationships, a critical element of Teaming, and discussed obstacles to Teaming, and made recommendations to improve Teaming.

Teamwork and Teaming become even more important as we face the reality of downsizing and the challenges that are inherent in new legal missions.

Dr. Barr defines Teamwork as action by a group of mutually trusting people working together to achieve shared goals in coordinated and cooperative effort while interacting responsibly with open communication.

Dr. Barr believes that Teamwork requires four attitudes from team members that are reflected in the way behavior is exhibited. Additionally, four skills and processes are essential to keep relationships in focus, with potential problems openly considered and explored.

Attitudes

Trust: A firm belief and confident expectation in the honesty, reliability and trustworthy intention of the other person.

Candor: Frank expression, straightforwardness about thoughts, feelings, and intentions.

Participation: Active sharing and taking part, both verbally and nonverbally.

Shared Values: Mutually shared values of worthwhile principles ... agreement about what is important, top priority, and essential.

Skills

Accurate Listening: Listening on all five levels: words and facts, logical consequences, pattern and intent, feelings and values, and response to the messages.

Shared Reasoning: Verbalizing the reasoning, clearly stating premises, assumptions, and conclusions for others to consider, interpret and question.

Conflict Resolution: Responsibly identify the issue, gather the different standpoints, identify the differences and work toward an agreement, identify criteria for effective resolution and demonstrate giving and receiving feedback.

Stakeholder Input to Decisionmaking: Stakeholders are those who are affected by the decision and thereby see themselves as having a stake in the decision. Getting their information into the decision process is important for fair consideration of Stakeholder standpoints.

The objectives of the Teaming project were to take a close look at how we interact, who we are, and what communication styles and types comprise the office. It is hoped that we each learn to accept these individual differences and to interact with each other so that we best use the gift that each of us has.

POC is **Steve Klatsky**, DSN 767-2304.

Faces In The Firm

Arrivals

Yuma Proving Ground

Mr. **Ronald F. Greek** came on board Monday, 1 December, as the Chief, Client Services. Ron will be responsible for legal assistance, claims, and other legal duties. Ron comes to us from private practice in Seattle, Washington. He is joined by his wife, Julita, and daughter Nicolette, 4. Ron is a Lieutenant in the Coast Guard Reserve. He is a valuable asset to the YPG SJA team. Welcome Ron, Julita, and Nicolette.

Pine Bluff Arsenal

Mr. **Garth Terry** joined the legal office as the Deputy Command Judge Advocate. Mr. Terry was previously in the United States Air Force, worked at the Little Rock Air Force Base, and was in private practice in Utah before joining our legal community. Garth and his wife, Sheri, have three sons and a daughter. Welcome aboard Garth.

Letterkenny Army Depot

Everett W. Bennett II joined the office coming from private practice in West Virginia. Mr. Bennett is married and has two children. Welcome to Pennsy.

Red River Army Depot

Lessa N. Whatmough has returned to the Red River Army Depot. The former Captain Whatmough left Red River and worked for the Veterans Administration as a civilian upon leaving the United States Army. She returned to the legal office as a civilian. Glad to have you back, Lessa!

Industrial Operations Command

The IOC Office of Counsel is expecting **Captain Eugene Baime** to arrive in January 1998. Captain Baime joins the IOC from the U.S. Army Legal Services, Falls Church, Virginia. Captain Baime will be specializing in the environmental law field. Looking forward to the Captain's arrival.

Brian Klinkenberg is at the IOC Office of Counsel focusing on office automation. Brian is a senior at North High School in Davenport, and is part of a cooperative agreement between the legal office and the Davenport School Board.

Promotions

Congratulations **Cathy Collins**, Corpus Christi. Cathy was promoted to a Paralegal Specialist, which includes a raise and two-grade increase. Well deserved, Cathy!

Congratulations **Captain Scott W. Hickey** on your promotion to the present grade of Captain. Captain Hickey has been at Red River Army Depot since early this year.

Births

Congratulations to **Gramma Gail** (paralegal specialist in the IOC Office of Counsel). Gail and Dick Fisher's son and daughter-in-law, Jeff and Cindy, recently celebrated the birth of their third child, Jenna Elizabeth. The beautiful little girl was welcomed home by her big brother and sister, Tyler and Casey.

Faces In The Firm

Awards and Recognition

Mike Wentink, Associate Counsel and Team Chief for Ethics, Office of Command Counsel, trained OGE attorneys and program personnel on 20 November 1997 concerning the Procurement Integrity law. OGE invited Mr. Wentink to provide this training because he is known as (and was introduced as) Mr. Procurement Integrity throughout the Executive Branch. He has presented this training throughout DOD and for other Executive Departments (Health and Human Services and Treasury), and for Executive Department ethics officials at the OGE Annual Conferences where it is always one of the most demanded and highly praised courses. OGE requested a copy of the training materials for its library, and asked Mike's permission to refer other agency ethics officials to him when OGE is not able to help them.

Steve Klatsky, Assistant Command Counsel, concentrating in the area of ADR, was the kick-off speaker for a program on ADR sponsored by the Defense Equal Opportunity Management Institute, Patrick AFB, Florida. Steve made a 2-hour speech on ADR History, statutory and regulatory provisions, and chaired a discussion on the benefits and characteristics of ADR.

Bye-Bye Bosses

The executive branch of government has lost about 25% of its supervisors since 1992, according to a survey by the Merit Systems Protection Board. Here is a selected list of agencies and percentage change in the number of supervisors:

DOD	-16%
Air Force	-13%
Army	-14%
Navy	-19%
Energy	-53%
OPM	-53%
EPA	-38%
Labor	-19%
SBA	-28%
SSA	-25%
VA	-28%.

FAREWELL

HQ AMC IP Counsel **Chuck Harris** is departing AMC to assume a position with the Army Medical Command at Fort Detrick, Maryland - Maybe the Terps will do better with you working in Maryland.,.....

WATCHING FOR STRESS!!!

According to the third edition of Jobs Rated Almanac, put out by National Business Employment Weekly, the 10 most stressful jobs are: US president, firefighter, senior corporate executive, Indy-class race car driver, taxi driver, surgeon, astronaut, police officer, NFL football player, air traffic controller.

HOPE Publications lists 35 stress reducers that include:

-Get up on time so you can start the day unrushed.

-Say no to projects that won't fit your schedule.

-Delegate tasks to capable colleagues.

-Allow extra time to do things and get to places.

-Make friends with happy, nonstressed people.

-Listen to relaxing tapes while driving to and from work.

-Laugh.

-Take your work seriously, but yourself not at all.

-Talk less, listen more.

-Sit on your ego.

Knight-Ridder

AMCCC-PA POINT PAPER 10 November 1997

SUBJECT: Inherently Governmental Functions

PURPOSE: Provide information about inherently governmental functions and their role in the QDR datacall

FACTS:

- Inherently governmental functions are those functions that are intimately related to the public interest and require either:
  - The exercise of discretion in applying government authority, or
  - The making of value judgements in government decision making.

- Inherently Governmental Functions normally fall into two categories:
  - The act of governing, i.e. the discretionary exercise of government authority.
  - Monetary transactions and entitlements.

- The QDR datacall was tasked by AMCRM to the MSCs on 3 October 1997.
  - Chapter 7 of the QDR datacall asks the MSCs to identify functions to study for potentially contracting-out.
  - Inherently governmental functions cannot be contracted out and must be performed by government employees.

- AMC Office of Command Counsel provided guidance on inherently governmental functions to the MSCs on 14 October 1997, 27 October and 4 November 1997. The guidance is intended to assist the MSCs in answering the application of the inherently governmental functions policies throughout AMC. The guidance consist of two parts:
  - A summary of existing policies (OFPP Policy Letter 92-1, Revised Supplemental Handbook to OMB Circular A-76)

prepared by AMCCC.

〈 Templates that designate the functions listed in AMC r 10-2 as either inherently governmental or contractible prepared by the HQ, AMC functionals and reviewed by AMCCC.

〈 Inherently governmental functions determination are a matter of policy not law. The HQ, AMC functionals are responsible for ensuring consistent determinations within their functional areas. Determination must be made on a case by case by case basis considering the totality of the circumstances, such as whether the function involves discretionary activities or value judgements that commit the government to a course of action in a way that significantly affects the public interest.

〈 The MSCs responses to the QDR datacall are due to AMC on 14 November 1997. AMC must report results to DA on 19 December 1997.

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AMCCC-IP POINT PAPER 12 November 1997

SUBJECT: Protecting Contractor Proprietary Data

PURPOSE: Emphasize proprietary data protection and use considerations.

FACTS:

- 10 U.S.C. § 2386 enables Contracting Officers to acquire rights to use proprietary technical data covering privately developed items, components and processes.

- Proprietary technical data will bear an appropriate legend identifying its proprietary status, and will be subject to usage restrictions as well as data protection safeguards.

- The importance of strict compliance with these restrictions and safeguards cannot be overemphasized, since failure to comply can result in significant Army financial liability and jeopardize the Army's right to continue using the technology. *AMC is currently involved in a $70 million controversy over an alleged failure to follow the rules in this area*.

- Procedures

  - In dealing with proprietary technical data, the usage restrictions will depend on the particular data rights acquired.

  - 'Limited Rights Data' is generally restricted to use and disclosure within Government, with manufacture rights precluded.

  - 'Government Purpose Rights' enables the Government to use and disclose the data to others for Government purposes; but the data should never be used for commercial purposes.

  - 'Specific License Agreement Rights' results from negotiations and may include atypical conditions and restrictions which require legal office coordination.

〈 When the Government has acquired the right to disclose proprietary data outside the Government, such disclosure will usually be subject to an appropriate nondisclosure agreement signed by the recipient. The agreement prohibits the recipient from using the data for any other purposes.

〈 Unauthorized use and disclosure of proprietary data by the Government can subject the Government to liability for damages, and may result in criminal and civil sanctions to individual government employees. It should be meticulously avoided.

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AMCCC-PA POINT PAPER 12 November 1997

SUBJECT: A-76 Cost Studies

PURPOSE: Provide information about when cost studies are required under OMB Circular A-76

FACTS:

〈 OMB Circular A-76 requires cost comparisons when converting commercial activities to or from in-house performance, contract or inter-service support agreement, unless an activity is exempt.

〈 *A* ***commercial activity*** is an activity that can be obtained from a commercial source. ***Inherently Governmental functions***, which involve the exercise of discretion in applying Government authority or use of value judgement in making decisions for the Government, are *not* commercial activities, and are thus not subject to OMB Circular A-76 or its supplemental handbook.

〈 ***Exemptions*** from cost comparison requirement – ***when converting the activity to or from in house, contract, or ISSA*** :

- ***National defense and national intelligence security***. The Secretary of Defense or Director of Central Intelligence, or designee, approves national security justifications.

- ***Conduct of Research and Development***, but *not* recurring and severable activities in support of research and development.

- ***Direct patient care*** at Government-owned hospitals.

- ***Minimum core capability*** of specialized scientific or technical employees.

- Activities where there is ***no satisfactory commercial source***. All reasonable efforts (in compliance with FAR) must be made to identify available sources.

- ***Activities performed by 10 or fewer full time equivalent employees (FTEs).*** Functions with 10 or fewer FTEs may be converted to contract if the contracting officer determines that offerors will provide required levels of service quality at fair and reasonable prices.

- Activities for which a ***waiver of cost comparison requirements is approved by the ASA(IL&E***). The waiver must be based on a determination that conversion will result in a significant financial or service quality improvement without reducing significantly the level or quality of future competition. A waiver must establish *why* in-house or contract offers have no reasonable chance of winning a competition conducted under cost comparison procedures.

- ***Functions at installations scheduled for closure on a date certain*** e.g. BRAC installations.

〈 Under OMB Circular A-76 and it Revised Supplemental Handbook, ***the following activities may be converted to contract without performance of an cost comparison***:

- ***Activities with 11 or more FTEs if*** fair and reasonable prices can be obtained through *competitive* award, and *all* directly affected employees serving on permanent appointments are reassigned to other comparable positions for which they are qualified.

  ❋ No commercial activity may be modified, reorganized, divided or changed for the purpose of circumventing this requirement.

  ❋ For activities performed at multiple locations, the number of FTEs encompassed within the solicitation scope of work generally determines whether the 11 FTE threshold is met.

  ❋ Per draft AR 5-20, the existing Government organization must be determined to be the most efficient organization (MEO).

- ❋ *But note:* Draft DODI 4100.33 and AR 5-20 take the position that an A-76 cost comparison *is required* for conversion of activities involving over 45 FTEs by 10 USC 2461. While some cost comparison is required by statute, it is still legally uncertain whether the statute requires compliance with OMB Circular A-76 cost comparison procedures.

- ***Activities performed by uniformed military*** personnel if the contracting officer determines that fair and reasonable prices can be obtained from commercial sources.

- ***Support services that are obtained from another department or agency under an ISSA***, after proper notification of termination is given to the providing agency.

- ***Activities awarded under preferential procurement programs***, defined in AR 5-20 as FAR Part 8 mandatory source programs, including Federal Prison Industries and workshops administered by the Committee for Purchase from the Blind and Other Severely Handicapped under the Javits-Wagner-O'Day Act.

〈 ***Temporary in-house performance*** of commercial activities is authorized where a contractor defaults or is otherwise terminated, and interim contractor support is unavailable.

〈 ***Depot Maintenance.*** By statute (10 USC 2464) an in-house capability to perform depot maintenance of mission essential materiel must be maintained. The Secretary of Defense must grant a waiver for activities designated for in house performance under this authority to be subject to a cost comparison under OMB Circular A-76 and contract performance. Depot maintenance workloads not considered subject to this restriction and which are above $3 million are not subject to A-76 procedures per 10 USC 2469.

〈 ***Statutory exemptions.*** Security guard and firefighting functions, and all activities performed at Crane and McAlester AAPs, are exempt from OMB Circular A-76 requirements by statute.

〈 ***Privatization of a commercial activity***, when the Government transfers ownership, control and performance of the activity, is not a commercial activity conversion to contractor performance. The Government no longer supervises or controls the activity, i.e. it "gets out of the business."

〈 ***Business process reengineering***. A workload reduction resulting from business process reengineering, where the function performed by Government employees no longer exists, is not considered to involve the conversion of a Government function to contractor performance and is not subject to cost comparison requirements.

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AMCCC-PA POINT PAPER 12 November 1997

SUBJECT: Common Threads to AMC Business Process Re-engineering Initiatives

PURPOSE: Provide information on systemic issues with AMC's Business Process Re-engineering Initiatives

FACTS:

〈 AMC has several large ongoing business process re-engineering initiatives, including the ***Apache Life Cycle Management Pilot***, the ***M109 Family of Vehicles Life Cycle Management Pilot***, and CECOM's ***Logistics Automation Privatization Pilot***.

〈 These initiatives are still in early stages, but some common threads are appearing. Those common threads include:

〈 ***OMB Circular A-76 cost comparison*** requirements apply unless (a) there is an applicable exemption, (b) a waiver is granted by the Assistant Secretary of the Army (Installations, Logistics & Engineering), or (c) the initiative meets the requirements of privatization. Privatization requires that the government convert a public function to private control and ownership. Examples include utilities and housing. Many functions in which the Government must maintain responsibility and control do not lend themselves to privatization. In those cases, we look for an applicable exemption, seek to justify a waiver on cost or technical grounds, or perform the cost comparison.

〈 ***Competition in Contracting Act (CICA)*** requirements apply to the initiatives unless a sole source justification, such as proprietary information, exists. In addition, to the extent that requirements which have been accomplished by small businesses are "bundled together" for efficiency, we must be prepared to document the government need for the efficiency and protect small business participation through incentives and evaluation criteria.

〈 ***Restrictions on contracting out depot maintenance*** apply to those initiatives which impact depot maintenance. We believe that we can accomplish the objectives of our initiatives through partnering agreements with our depots and industry which provide for maintaining levels of employment at the depots while incorporating the benefits of best industry practices.

〈 The larger initiatives generate ***significant political interest***. As a result, they have all required briefings for individuals up to and including the Secretary of the Army, and detailed Congressional briefings. These briefings have resulted in political support. Extra time must be built into initiative schedules to provide for these briefings.

〈 All of the larger initiatives have significant potential impact on readiness and on Army financial management. To allow for exploration and resolution of these issues, formalized ***General Officer Steering Committees*** with subordinate ***Integrated Process Teams*** have been formed. This process has been very successful in raising and resolving very complex issues impacting Army-wide processes.

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AMCCC-PA POINT PAPER 10 November 1997

SUBJECT: Official Representation Funds

PURPOSE: Provide information on the proper use of official representation funds (ORFs)

FACTS:

- Governing regulation is AR 37-47, Representation Funds of the Secretary of the Army, dated 31 May 96.
- ORFs are a subset of the OMA account; identified through an .0012 limitation in fund cite.
- Purpose - extend "official courtesies" to "authorized guests."
- "Official courtesies" are events to maintain standing and prestige of the United States at home and abroad. E.g.:
  - Dinners and receptions in honor of authorized guests
  - Entertainment to maintain civic or community relations
  - Receptions for local authorized guests to meet with newly assigned commanders or other senior officials
- Three categories of "authorized guests":
  - Foreign citizens of suitable stature
  - Federal, state, county, and local government officials
  - National or regional dignitaries, and prominent local citizens - includes individuals who are recognized leaders in their fields of expertise
- Spend ORFs only on functions conducted on a "modest basis."
- As a general rule, ORFs may not be used solely for the entertainment of, or in honor of, DOD personnel.
- Whether ORFs may be used to pay for DOD personnel attending an event depends on ratio of authorized guests to DOD personnel:

- For parties of < 30 persons, 20% of the official guest list must be authorized guests and members of their party.
- For parties • 30, 50% of the official guest list must be authorized guests and members of their party.
- If these ratios are met, ORFs pay 100%. If they are not met, DOD personnel must pay pro rata share out of pocket.

- ORFs may also be used for gifts, momentos, or tokens that will be presented to authorized guests.

- Incidental costs (e.g., salaries and transportation of DOD personnel) shall be charged to the normal appropriation legally available for such purposes.

- Specific prohibitions – ORFs may not be used for:
  - Entertainment of, or gifts to, DOD personnel (limited exceptions)
  - Expenses for classified projects for intelligence purposes
  - Membership fees or dues
  - Personal obligations such as greeting cards or the purchase of flowers to mark a purely personnel occasion
  - Gifts or flowers that an authorized guest wishes to present to any other individual
  - Clothing, toilet articles, or other personal items a guest purchases
  - Long distance calls placed by authorized guests
  - Repair, maintenance, or renovation projects to enhance appearance of DOD facilities

- AR 37-47 requires legal review before the certifying and approving officer acts on a request to use ORFs.

- Exceptions to AR 37-47 require SECARMY approval.

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AMCCC-PA POINT PAPER 12 November 1997

SUBJECT: FY 98 DOD Authorization Bill

PURPOSE: To summarize highlights from the FY 98 Authorization Bill, H.R. 1119, as presented to the President on 6 Nov 97

FACTS:

〈 **Reduction in Personnel Assigned to Management Headquarters and Headquarters Support Activities** (new Sec. 911). Extends the period in which the 25% reduction in management headquarters and headquarters support activities personnel must be completed until 1 October 2002 (a 5% cut each year).

〈 **Reductions in the Defense Acquisition Workforce** (new Sec. 912). This provision calls for a one-time reduction in Defense Acquisition personnel of 25,000 in FY98. The SEC DEF can waive the reduction for up to 15,000 personnel if he certifies to Congress by 1 June 1998 that the reductions would adversely affect military readiness or acquisition efficiency. The SEC DEF must also submit a plan for streamlining the acquisition organization by 1 April 1998.

〈 **Depot Level Activities** (new Secs. 355-367). The conference report contained several depot-level provisions including an increase in the amount of depot-level maintenance that can be contracted out to 50%, balanced by an expanded definition of "depot level maintenance and repair." The bill also amends 10 USC 2469 to restrict contracts for depot maintenance and repair at a military installation where a maintenance facility was closed by BRAC 95, and would require the SEC DEF to designate each depot other than those recommended for closure or realignment under BRAC as a Center of Industrial and Technical Excellence in its core competencies and permits them to form public-private partnerships.

〈 **Extension of VSIP authority** (new Sec. 1106) Revises and extends DOD VSIP authority through 30 September 2001.

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- **Acquisition Reform** (new Secs. 801-855). Includes provisions permitting several service contracts to cross fiscal years for a period not to exceed one year, and eliminating major weapons systems warranties.

- **Financial Assistance for Additional Duties of the National Guard** (Sec. 386) This section allows the SEC Army to pay to use certain services performed by state guard organizations.

- **Privatization Measures for other DOD organizations** have been largely eliminated. However, military departments are permitted to contract directly with GPO rather than DPS.

- **Contract Advisory and Assistance Services budget reduced by $174 million** in OMA and Procurement accounts (per 23 October 1997 press release).

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With the recent significant increase in the use of nonprocurement instruments at TACOM-ARDEC, some contracting officers have asked if such instruments may be protested to the GAO. The general rule is that the GAO will NOT review protests regarding award of cooperative agreements (CA's) or other nonprocurement instruments (like grants, other transactions (OT's) and cooperative research and development agreements (CRADAs)).

Under the Competition in Contracting Act (CICA) and the GAO Bid Protest Regulations (4 C.F.R. 21), the GAO has jurisdiction over protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods or services, and solicitations leading to such awards. Grants and cooperative agreements reflect a relationship between the United States Government and a recipient when the principal purpose is to transfer a thing of value to carry out a public purpose of support or stimulation (Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6304 and 6305). CRADA's may only be used where the purpose of the agreement is to transfer technology from a federal laboratory to a nonfederal entity for the purpose of conducting specified research or development work in collaboration with the nonfederal entity (15 U.S.C. Sections 3702, 3710a (c(2) (1988)). In contrast, a contract is used only when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the United States Government (31 U.S.C. 6303 and FAR 35.003(a)). Therefore, the GAO has held that they do not review protests of nonprocurement instruments (CA's , Grants, OT's and CRADAs) because they do not involve the award of a "contract". See, Sprint Communications Co., L.P., B-256586, B-256586.2, May 9, 1994, 94-1 CPD 300; Resource Dev. Program & Servs., Inc., B-235331, May 16, 1989, 89-1 CPD 471.

There is, however, a limited exception to this general rule where the GAO will review a timely protest of a nonprocurement instrument. The GAO will consider a protest that alleges an agency improperly used a cooperative agreement, grant, CRADA or other nonprocurement instrument where a "procurement contract" is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. See, Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD 451. In the case of a grant or CA, the scope of this review involves a consideration of whether the agency's actions are proper in light of the parameters set forth for use of a grant or CA in the Federal Grant and Cooperative Agreement Act. In the case of a CRADA, the review
involves whether or not the CRADA is being used properly in accordance with the terms of the Federal Technology Transfer Act (15 USC 3710a). See, Spire Corporation, B-258267, December 21, 1994, 94-2 CPD 257.

Finally, although the GAO will explore whether or not an agency properly used a nonprocurement instrument as opposed to a contract, it has refused to consider the pure issue of whether or not the correct nonprocurement instrument was used. In Energy Conversion Devices, Inc., B-260514, June 16, 1995, the protester (ECD) challenged ARPA's choice of an other transaction for the development and demonstration of a vapor phase manufacturing technology. ECD pointed out that the authority of 10 U.S.C. 2371 (use of an other transaction) is only available when "the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate". ECD complained that ARPA had not shown that it could not accomplish its goals by use of "a standard contract, grant, or cooperative agreement" as required by the statute. While ARPA did not address the issue of whether or not it could have used a grant or cooperative agreement, it did convince the GAO that the principle purpose of the protested action was to stimulate or support research and development for a public purpose. The GAO held that ECD had not shown that a procurement contract was the required instrument and stated that "We need not resolve whether ARPA has satisfied the statutory prerequisites to entering into an "other" instrument under section 2371 since the agency's choice of which nonprocurement instrument or authority to rely on is irrelevant to the question of whether we will consider ECD's protest".

In view of the above discussion, it is increasingly important when using a nonprocurement instrument to justify in writing why the use of a procurement contract is not appropriate in your particular circumstances. Your choice of a nonprocurement instrument rather than a procurement contract may be subject to review by the GAO where the case will focus on your justification of that selection.

Denise C. Scott
Counsel

AMSCB-GC December 3, 1997

MEMORANDUM FOR U.S. Army Materiel Command Attorneys

SUBJECT: Proposed Amendment to the Federal Advisory Committee Act

1. Congress recently proposed an amendment to the Federal Advisory Committee Act (ìFACAî) which would exempt the National Academy of Sciences (ìNASî) and its subordinate committees from coverage under FACA. However, even though the NAS may now be exempt, a review of the proposed amendment indicates the NAS may be required to make committee proceedings more open to the public.

2. A summary of the proposed requirements follows:

Requires that the NAS be free from ìactual management or controlî by the Federal Government.(*)

Requires that the NAS provide public notice regarding the names and biographies of committee members. (Also requires a reasonable public comment period.)

Requires that NAS committee members be free from conflicts of interest unless certain conditions are met.

Requires that NAS committee reports be the product of ìindependent judgmentî.

Requires that the NAS provide public notice of all open meetings. (*)

Requires that the NAS open ìdata gatheringî meetings to the public -- unless the information is covered by a FOIA exemption. (*)

Requires that the NAS publish summaries of all other meetings (i.e., non-data gathering meetings) -- unless the information is covered by a FOIA exemption. (Allows the NAS to assess a reasonable charge for the summaries.) (*)

Requires that the NAS publish all NAS final reports -- unless the information is covered by a FOIA exemption. (Allows the NAS to assess a reasonable charge for the reports.) (*)

Requires that the NAS make public the names of the final reviewers. (*)

A final important point: Should this proposed FACA amendment become law, several of its requirements, as asterisked (*) above, apply retroactively to any NAS committees formed after 1972.

3. Status: The proposed amendment is currently waiting for the Presidentís signature. I have enclosed a copy of the text for your review.

4. If you have any questions, please contact me at (410) 671-1298, HYPERLINK mailto:lrsimon@cbdcom.apgea.army.mil lrsimon@cbdcom.apgea.army.mil . In

addition, you can find more information on this topic at the National Academy of Sciencesí Internet site: HYPERLINK http://www.nas.edu http://www.nas.edu .

LISA SIMON
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5 USC ßß 1-15 (1988 Supp. V 1994). FACA prohibits federal agencies from ìestablish[ing] or utiliz[ing]î advisory committees, unless certain stringent requirements are met, including public notice, access and reporting requirements.

This proposed legislation stems from a recent D.C. Circuit case which held that the NAS is subject to FACA: Animal Legal Defense Fund v. Shalala, 104 F.3d 424 (D.C. Cir. 1997), writ of certiorari denied November 4, 1997.
NAS reports go through a detailed peer review process. By custom, the names of peer reviewers were not been made public.

AMCCC-IP POINT PAPER 12 November 1997

SUBJECT: Respecting the Rights of Copyright Owners

PURPOSE: Provide information of a recent copyright infringement claim asserted against AMC and provide guidance on preventing copyright infringement.

FACTS:

Army policy is to respect the rights of private copyright owners. Army Regulation 27-60 states that copyrighted works will not be reproduced, distributed, or publicly performed without the permission of the copyright owner. Exceptions to this policy are allowed only if use is permitted under the copyright laws or the use is required to meet an immediate mission-essential need for which nonconforming alternatives are unavailable or unsatisfactory.

Recently, an AMC MSC used a copyrighted poem on several brochures and posters without the copyright owner's permission. Although the use was without knowledge that the poem was copyrighted, AMC has received a claim for $70,000 in damages from the author of the poem and has been the object of unnecessary public criticism.

Caution must be exercised to ensure that AMC brochures, posters, videos, software, and Internet homepages do not include copyrighted material unless advanced permission has been obtained form the copyright owner. Identifying copyrighted material is not always easy--a work may be copyrighted even though it does not contain a copyright notice. Accordingly it is imperative to know the source of all materials before they are used.

Questions concerning copyright law should be referred to your supporting legal office or the HQ AMC Office of the Command Counsel, DSN 767-2556.

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MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT AND SAFETY)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DIRECTOR, DEFENSE LOGISTIC AGENCY (CAAE)

SUBJECT: EPA Inspections for Compliance with EPCRA

The Environmental Protection Agency (EPA) Federal Facilities Enforcement Office tasked EPA regional personnel to conduct Emergency Planning and Community Right-To -Know Act (EPCRA) inspections of federal facilities. Executive Order 12856 authorizes EPA to conduct reviews and inspections of federal facilities to ascertain compliance with EPCRA and Pollution Prevention Act requirements (see section 5-5 "Compliance."). EPA cannot take enforcement actions (fines, civil or criminal penalties) as provided in EPCRA against federal agencies that fail to comply with applicable EPCRA sections. However, in accordance with section 5-507 of EO 12856, EPA has outlined procedures to be followed if a facility is found to be out of compliance with EPCRA (see attachment). The Federal Facilities Enforcement Office is particularly interested in the extent to which exemptions provided in EPA and DoD guidance documents affected Toxic Release Inventory (TRI) reporting. EPA will share information found with DoD to improve TRI reporting.

DoD Component personnel shall cooperate fully with EPA regional personnel conducting the inspection. DoD Component personnel shall notify their chain of command, their Regional Environmental Coordinator and their respective POC listed in attachment 2 upon receiving notice of EPA's intent to inspect an installation for EPCRA compliance. DoD Component personnel should be prepared to provide EPA staff, in a timely manner, any information related to the preparation of all EPCRA reports (sections 302, 311-313) and all information that documents toxic chemical use, justifies reporting or non-reporting decisions, and documents release and transfer estimates or calculations. If the requested information is not available, installation personnel should explain in writing why the information is not available.

EPA personnel will ask DoD installation personnel why they took an exemption to TRI reporting. DoD Component personnel shall have available and shall provide to EPA prior to inspections all relevant DoD guidance for implementing the Executive Order (March 1995 Implementing Guidance and July 1996 Supplemental Guidance).

If EPA personnel question the validity of the exemption claim, DoD Component personnel shall:

- Explain in writing why the exemption was taken and should site the applicable section of DoD Guidance.
- Refer EPA personnel to the appropriate individuals in their chain of command and their respective POC listed in attachment 2.

DoD Component personnel should not have to amend TRI Form Rs to satisfy EPA personnel if a legitimate exemption was taken based on DoD guidance. Installations should not negotiate with EPA personnel over the applicability of exemption provided in DoD policy. Negotiations of this kind may risk setting precedent and lead to inconsistency in EPCRA reporting. If an exemption was not taken in accordance with DoD guidance or if the inspection reveals activities that should have been reported, TRI Form Rs may be amended. If DoD Component personnel plan to amend Form Rs, they shall notify individuals in their chain of command and their respective POCs.

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EPA's inspections are a necessary component of complying with EO 12856. The findings of these inspections should be welcomed by DoD and will be used to improve existing policies and programs. Inspections conducted to date have been friendly and have lead to improvements in facility programs. My point of

contact on this issue is Mr. Andrew Porth (703-604-1820, DSN 664-1820).

Curtis Bowling
Acting Assistant Deputy Under Secretary of Defense
(Environmental Quality)

Attachments

cc: HQDA(DAIM-ED)
CNO (N45)
HQMC (CMC-LFL)
HQAF/ILEVQ

COPY OF EPA's Guidance

EPA Federal Facilities Guidance to EPA Regional Offices

Guidance on Process for Resolving EO 12856 and EPCRA Compliance Problems at Federal Facilities

Background

Section 1-101 of Executive Order (EO) 12856 requires the head of each federal agency (as defined in 5 U.S.C. 105 (5 U.S.C. 102 for military departments/Department of Defense)) to ensure that all necessary actions are taken for the prevention of pollution with respect to that agency's activities and facilities, and to ensure that agency's compliance with pollution prevention and emergency planning and community right-to-know provisions established pursuant to all implementing regulations pursuant to the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) (EPCRA) and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) (PPA). Section 3-304 of EO 12856 requires that federal agencies comply with the provisions set forth in section 313 of EPCRA, section 6607 of

PPA, all implementing regulations, and future amendments to these authorities, in light of applicable guidance as provided by EPA (See April, 1995 Guidance for Implementing Executive Order 12856). Section 3-305 of EO 12856 requires that federal agencies comply with the provisions set forth in sections 301 through 312 of EPCRA, all implementing regulations, and future amendments to these authorities in light of applicable guidance as provided by EPA (See April, 1995 Guidance for Implementing Executive Order 12856).

Section 5-502 of EO 12856 requires the head of each federal agency to ensure that such agency take all necessary actions to prevent pollution in accordance with the EO, and to comply with the provisions of EPCRA and PPA. Compliance with EPCRA and PPA means compliance with the same substantive, procedural, and other statutory and regulatory requirements that would apply to a private person. Section 5-502 of EO 12856 also states that nothing in the EO is to be construed as making the provisions of sections 325 and 326 of EPCRA (the enforcement and penalty provisions) applicable to any federal agency or facility, except to the extent that such federal agency or facility would independently be subject to such provisions.

Section 5-504 of EO 12856 authorizes the EPA Administrator to conduct such reviews and inspections as may be necessary to monitor compliance with sections 3-304 and 3-305 of the EO, and all federal agencies are encouraged to cooperate fully with the efforts of the EPA Administrator to ensure compliance with sections 3-304 and 3-305 of the EO. Section 5-506 of the EO requires a federal agency to achieve compliance as promptly as practicable when the EPA Administrator notifies such federal agency that it is not in compliance with an applicable provision of the EO.

Process

Taken together, the above-cited provisions of EO 12856 require that federal agencies comply with EPCRA 301 through 313 requirements, and authorize EPA to conduct such reviews and inspections as are necessary to monitor compliance. Federal agencies are encouraged to cooperate fully with EPA's efforts to ensure compliance, and are required to achieve compliance as promptly as practicable when notified of noncompliance. However,

pursuant to section 5-502 of EO 12856, EPA and the States may not take enforcement actions as provided by EPCRA against federal facilities for failure to comply with the applicable EPCRA sections. Given the EO's limitation on EPA's enforcement and penalty authority vis-a-vis federal facilities, the following guidance on a process involving both the Regional EPCRA and Federal Facility Coordinators has been developed for bringing federal facilities into compliance with EPCRA sections 301 through 313.

(a) Initial Compliance Screening: An initial compliance screening should be undertaken by Regional EPCRA staff and/or Regional Federal Facility Coordinators. For EPCRA 313 purposes, this initial determination could include comparison of TRIS reporters against various lists of federal facilities potentially subject to the EO and 313, as well as any other information or reason to believe a facility is likely to meet the reporting threshold and thus be a covered facility for purposes of EO 12856 (e.g., permits, major source status, etc.). The initial determination should also include any other pertinent information relative to the applicability of compliance with EPCRA sections 301 through 312. For EPCRA 312 purposes, the determination could include checking with the State Emergency Response Commission (SERC) and the Local Emergency Planning Committee (LEPC) to determine if Tier II reports were submitted by the facility. If an inspection has already been conducted which indicates noncompliance, then the Region should proceed to step (d) below in the process.

(b) Informal Facility Notification and Response: If, based upon the initial compliance screening, noncompliance is apparent or the Region still has reason to believe any of the requirements of the EO or EPCRA apply to the federal facility, informal contact with the facility (i.e., telephone call) should be made to more definitively ascertain the compliance status of the facility. If the federal facility is in compliance, no further action is required on the part of EPA. However, the facility must understand that "compliance" in this instance includes submission to Regional staff of a copy of the appropriate EPCRA report that was submitted to EPA and/or the SERC/LEPC, etc., or submission of documentation supporting any facility claim that the facility is not a covered facility under EO 12856 or that EPCRA is not otherwise applicable. Regions may also request other appropriate

information to document the compliance status of the federal facility, and facilities should generally be given 20-30 days to comply with the regional request.

(c) Inspection: If the compliance status of the federal facility is not definitively ascertained, an inspection as authorized section 5-504 of EO 12856 may be warranted. An inspection may also occur independently of the initial compliance screening and telephone contact process described in step (b) above. Once an inspection confirms noncompliance, a show-cause letter should be issued by the region requiring the Federal facility to show-cause (i.e., demonstrate) why EPA should not report to the President the facility's noncompliance and/or place the facility on a schedule to return to compliance (e.g., via a Federal Facility Compliance Agreement). The show-cause letter, a boilerplate example of which has been drafted, is described in step (d) below.

Basic EPCRA inspector credentials are all that is required to conduct EPCRA inspections at the vast majority of Federal facilities. Special clearance and/or credentials are not required. While there may be certain areas of the facility or national security information that the inspector has limited or no access to, this should not prevent an EPCRA inspection from being conducted. With some advance notice of the inspection, which is encouraged, most facilities will work with the inspector to minimize even these limitations. In those rare instances where a clearance issue is raised by the facility, the inspector should proceed to conduct a review of available records and inspect those areas of the facility that are open to the inspector. If a facility attempts to deny entry to an inspector for clearance issues or any other reason, the Office of Regional Counsel in the particular region should be consulted to help the inspector gain access to the facility for purposes of conducting the inspection.

(d) Show-Cause Letter: Once noncompliance is confirmed using some combination of steps (a)-(c) above, a show-cause letter should be issued by the region requiring the federal facility to show-cause (i.e., demonstrate) why EPA should not report to the President the facility's noncompliance and/or place the facility on a schedule to return to compliance (e.g., via a Federal Facility Compliance Agreement). The show-cause letter should

require compliance, including submittal of applicable EPCRA information, within 45 days of receipt of the show-cause letter by the facility, and should include a "cc" to the facility's HQ and EPA HQ. The show-cause letter should inform the facility that the facility response to the show-cause letter must include: 1) submission to regional staff of a copy of the appropriate EPCRA report that was submitted to EPA and/or the SERC/LEPC, etc.; 2) submission of documentation supporting any facility claim that the facility is not a covered facility under EO 12856 or that EPCRA is not otherwise applicable; or 3) an indication that compliance cannot be achieved within the 45-day period and a commitment to negotiate a Federal Facility Compliance Agreement.

The show-cause letter should also indicate that the federal facility's return to compliance within 45 days of receipt of the show-cause letter by the facility will nullify EPA's obligation to report to the President the facility's noncompliance and/or place the facility on a schedule to return to compliance. Upon receipt by EPA of adequate information demonstrating compliance with EPCRA and the EO, regional staff should send a letter back to the facility acknowledging receipt of the information, and, as appropriate, reminding the facility of the annual nature of certain EPCRA reporting requirements.

(e) Follow-up to Show-Cause Letter - HQ Contact: If, within the 45-day time period specified in the initial show-cause letter, 1) compliance is not achieved, 2) the facility fails to demonstrate that it is not a covered facility under EO 12856 or that EPCRA is not otherwise applicable, or 3) the facility fails to indicate that it is willing to negotiate a Federal Facility Compliance Agreement, the Region should notify EPA HQ in writing. EPA HQ will then contact the Federal facility's HQ to require, within that time period not to exceed 90 days from receipt by the federal facility of EPA's initial show-cause letter, 1) compliance by the facility, 2) a demonstration that the facility is not a covered facility under EO 12856 or that EPCRA is not otherwise applicable, or 3) conclusion of/good faith negotiation of a Federal Facility Compliance Agreement.

Once the Regional notification to EPA HQ has occurred, Regional staff should send a letter to the noncompliant federal facility and its HQ which references the requirements set forth in the show-cause letter and the fact that the region never

received a response. The letter should reiterate that the region wishes to negotiate a Federal Facility Compliance Agreement to place the facility on a schedule for returning to compliance with EPCRA and the EO. The letter should also indicate that the federal facility's demonstration of compliance (or conclusion of/good faith negotiation of a Federal Facility Compliance Agreement) within 90 days of receipt of the initial show-cause letter by the facility is the only way to prevent the facility from being listed in EPA's Annual report to the President as being in noncompliance with EPCRA and the EO 12856. Upon receipt by EPA of adequate information demonstrating compliance with EPCRA and the EO, regional staff should send a letter back to the facility (with a "cc" to the facility's HQ and EPA HQ) acknowledging receipt of the information, and, as appropriate, reminding the facility of the annual nature of certain EPCRA reporting requirements.

(f) Facility Listing: If, within the 90-day time period described in step (e) above, 1) compliance is not achieved, 2) the facility fails to demonstrate that it is not a covered facility under compliance EO 12856 or that EPCRA is not otherwise applicable, or 3) the facility fails to conclude/enter good faith negotiation of a Federal Facility Compliance Agreement, the facility will be listed in EPA's annual report to the President and entered into EPA's IDEA data base and Quarterly Compliance Status Reports as being in noncompliance with EPCRA and EO 12856. Compliance and a commitment to future compliance with the EO and EPCRA will be required in order for the facility not to be listed in EPA's subsequent annual report to the President.

Attachment 2 DoD Component POCs

Policy Points of Contact

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OSD

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MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT AND SAFETY)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DIRECTOR, DEFENSE LOGISTIC AGENCY (CAAE)

SUBJECT: EPA Inspections for Compliance with EPCRA

The Environmental Protection Agency (EPA) Federal Facilities Enforcement Office tasked EPA regional personnel to conduct Emergency Planning and Community Right-To -Know Act (EPCRA) inspections of federal facilities. Executive Order 12856 authorizes EPA to conduct reviews and inspections of federal facilities to ascertain compliance with EPCRA and Pollution Prevention Act requirements (see section 5-5 "Compliance."). EPA cannot take enforcement actions (fines, civil or criminal penalties) as provided in EPCRA against federal agencies that fail to comply with applicable EPCRA sections. However, in accordance with section 5-507 of EO 12856, EPA has outlined procedures to be followed if a facility is found to be out of

compliance with EPCRA (see attachment). The Federal Facilities Enforcement Office is particularly interested in the extent to which exemptions provided in EPA and DoD guidance documents affected Toxic Release Inventory (TRI) reporting. EPA will share information found with DoD to improve TRI reporting.

DoD Component personnel shall cooperate fully with EPA regional personnel conducting the inspection. DoD Component personnel shall notify their chain of command, their Regional Environmental Coordinator and their respective POC listed in attachment 2 upon receiving notice of EPA's intent to inspect an installation for EPCRA compliance. DoD Component personnel should be prepared to provide EPA staff, in a timely manner, any information related to the preparation of all EPCRA reports (sections 302, 311-313) and all information that documents toxic chemical use, justifies reporting or non-reporting decisions, and documents release and transfer estimates or calculations. If the requested information is not available, installation personnel should explain in writing why the information is not available.

EPA personnel will ask DoD installation personnel why they took an exemption to TRI reporting. DoD Component personnel shall have available and shall provide to EPA prior to inspections all relevant DoD guidance for implementing the Executive Order (March 1995 Implementing Guidance and July 1996 Supplemental Guidance).

If EPA personnel question the validity of the exemption claim, DoD Component personnel shall:

- Explain in writing why the exemption was taken and should site the applicable section of DoD Guidance.
- Refer EPA personnel to the appropriate individuals in their chain of command and their respective POC listed in attachment 2.

DoD Component personnel should not have to amend TRI Form Rs to satisfy EPA personnel if a legitimate exemption was taken based on DoD guidance. Installations should not negotiate with EPA personnel over the applicability of exemption provided in DoD policy. Negotiations of this kind may risk setting precedent and lead to inconsistency in EPCRA reporting. If an exemption was not taken in accordance with DoD guidance or if the inspection

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EPA's inspections are a necessary component of complying with EO 12856. The findings of these inspections should be welcomed by DoD and will be used to improve existing policies and programs. Inspections conducted to date have been friendly and have lead to improvements in facility programs. My point of contact on this issue is Mr. Andrew Porth (703-604-1820, DSN 664-1820).

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Process

Taken together, the above-cited provisions of EO 12856 require that federal agencies comply with EPCRA 301 through 313 requirements, and authorize EPA to conduct such reviews and inspections as are necessary to monitor compliance. Federal agencies are encouraged to cooperate fully with EPA's efforts to ensure compliance, and are required to achieve compliance as promptly as practicable when notified of noncompliance. However, pursuant to section 5-502 of EO 12856, EPA and the States may not take enforcement actions as provided by EPCRA against federal facilities for failure to comply with the applicable EPCRA sections. Given the EO's limitation on EPA's enforcement and penalty authority vis-a-vis federal facilities, the following guidance on a process involving both the Regional EPCRA and Federal Facility Coordinators has been developed for bringing federal facilities into compliance with EPCRA sections 301 through 313.

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Attachment 2 DoD Component POCs

Policy Points of Contact

Army

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ENVIRONMENTALLY RELATED EXECUTIVE ORDERS

A PARTIAL LIST

Executive Order 13061, **Federal Support of Community Efforts Along American Heritage Rivers**, 11 Sep 1997, 62 FR 48442

Executive Order 13045, **Protection of Children from Environmental Health Risks and Safety Risks**, 21 Apr 1997, 62 FR 19885

Executive Order 13007, **Indian Sacred Sites**, 24 May 1996.61 FR 26771

Executive Order 13006, **Locating Federal Facilities on Historic Properties in Our Nation's Central Cities,** 21 May 1996, 61 FR 26071

Executive Order 12915, **Federal Implementation of the North American Agreement on Environmental Cooperation,** 13 May 1994, 59 FR 25775

Executive Order 12898, **Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations,** 11 Feb 1994, 59 FR 7629

Executive Order 12902, **Energy Efficiency and Water Conservation,** 8 Mar 1994, 59 FR 11463

Executive Order 12873, **Federal Acquisition, Recycling, and Waste Prevention,** 20 Oct 1993, 58 FR 54911

Executive Order 12856, **Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements,** 3 Aug 1993, 58 FR 41981

Executive Order 12845, **Purchasing Energy Efficient Computer Equipment,** 21 Apr 1993, 58 FR 21887

Executive Order 12844, **Federal Use of Alternative Fueled Vehicles**, 21 Apr 1993, 58 FR 21885

Executive Order 12843, **Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances,** 21 Apr 1993, 58 FR 21881

Executive Order 12580, **Superfund Implementation,** 23 Jan 1987, 52 FR 2923, as amended by Executive Order 12777, 18 Oct 1991, 56 FR 54757

Executive Order 12114, **Environmental Effects Abroad of Federal Actions,** 4 Jan 1979, 44 FR 1957

Executive Order 12088, **Federal Compliance with Pollution Control Standards,** 13 Oct 1978, 43 FR 47707

Executive Order 11990, **Protection of Wetlands,** 24 May 1977, 42 FR 26961

Executive Order 11988, **Floodplain Management,** 24 May 1977, 42 FR 26951

Executive Order 11987, **Exotic Organism,** 24 May 1977, 42 FR 26949

Executive Order 11738, **Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans,** 10 Sep 1973, 38 FR 25161

Executive Order 11644, **Use of Off-Road Vehicles on the Public Lands,** 8 Feb 1972, 37 FR 2877

THE ENVIRONMENTAL LAW DIVISION
BULLETIN

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President Clinton Signs Executive Order for Federal Support of Community Efforts Along American Heritage Rivers - MAJ Allison Polchek

On 11 September 1997, President Clinton issued Executive Order 13061, Federal Support of Community Efforts Along American Heritage Rivers. This Executive Order can be found at http://www.epa.gov/rivers. This Executive Order may have implications for installations under the National Environmental Policy Act (NEPA).

The Executive Order is an initiative to support community-led efforts relating to rivers that spur economic revitalization, protect natural resources and the environment, and preserve historical and cultural heritage. Communities can nominate, and the President will designate, several rivers as American Heritage Rivers. The first designations are expected in early 1998. This designation will commit the Federal government to focus the delivery of resources to support and restore these rivers and their adjacent communities.

Agencies will be required to commit to a policy that will ensure that their actions have a positive effect on the natural, historic, economic, and cultural resources of the designated rivers and communities. The agency will be required to consult with the communities, consider their objectives, and ensure that actions are compatible with the overall character of the community. Installations should use the NEPA process to examine the impact their actions will have on these designated rivers and communities.

*Resource Conservation and Recovery Act (RCRA)**Resource Conservation and Recovery Act (RCRA)*

Rulemaking Update - MAJ Lisa Anderson-LloydUpdate - MAJ Lisa Anderson-Lloyd

Hazardous Waste Identification Rule For Contaminated Media

The Environmental Protection Agency (EPA) issued a notice of proposed rulemaking for the Hazardous Waste Identification Rule for Contaminated Media (HWIR-media) on April 29, 1996.[1] As a part of the reinventing government effort, the rule was intended to streamline Federal rules under RCRA for cleanup of contaminated media and other remediation wastes. The proposed rule was the subject of an EPA and State workgroup that had been attempting to reach consensus on RCRA cleanup reform since 1993. The rule proposed a risk-based Abright line@ scheme that would require Federal regulation of wastes with toxicity levels falling above the Abright line@ and delegate to States cleanup control for wastes with toxicity levels below the Abright line.@ Due to opposition to this scheme from both environmentalists and industry, the EPA is considering other options to avoid the contentious issues surrounding the Abright line@ proposal. The EPA has just recently decided to abandon the 1996 proposal and finalize only parts of the original proposal.

The EPA plans to focus on a few, more narrowly tailored regulatory changes to hazardous waste cleanup rather than pursue the comprehensive approach of the original HWIR-media proposal. It is likely that the method of distinguishing higher and lower risk contamination by use of the Abright line@ scheme has been scrapped. In addition, the EPA will not withdraw the corrective action management regulations as earlier proposed, but will allow them to complement the revised rule. Possible targets of a more focused regulation include: alternative land disposal restriction treatment standards for hazardous contaminated soil; streamlined permitting for cleanup sites; options for remediation piles; and a RCRA exclusion for dredged materials managed under the Clean Water Act or Marine Protection Research and Sanctuaries Act. The EPA expects to finalize the rule in June 1998.

Hazardous Waste Recycling Rule**Hazardous Waste Recycling Rule**

The EPA Office of Solid Waste has decided not to pursue a comprehensive rulemaking to reform the Federal hazardous waste recycling scheme. Since 1993, the agency has been studying ways to create a simpler, clearer regulatory system for hazardous waste recycling. In late 1996, the EPA began meeting with stakeholders to discuss a draft proposal for rewriting the RCRA definition of solid waste to clarify what materials would be subject to regulation and what materials would be exempt under recycling rules. The draft proposal offered two options for regulating and/or exempting the recycling of secondary materials. Under the Atransfer-based@ option, material is excluded from regulation if it is recycled Aon-site@ and meets certain requirements. The Ain-commerce@ option excludes material based on *how* it is recycled not on *where* it is recycled. These proposals have received widespread opposition from the States, industry, and environmental groups. As with the HWIR-media rule, the EPA has now decided to pursue some narrower regulatory initiatives rather than a wide-ranging reform. The original proposal was expected in early 1998, however, there may be some delay to address the concerns raised and craft the narrow regulatory fixes.

Corrective Action Rulemaking

EPA proposed a regulatory framework for implementing corrective action in July 1990 and issued a revised advanced notice of proposed rulemaking in May 1996.[2] Since the 1996 proposal, the EPA has been evaluating comments received from the public and working on a set of principles for reforming corrective action through possible legislative effort. The EPA now plans to release a notice of data availability early in 1998 that will incorporate changes suggested through the comment process. It may be that the corrective action rule will not be issued as proposed but will take the form of guidance or restatement of policy. The focus of the reform appears to be on streamlining cleanups without emphasizing the process. The rule would set technical and procedural requirements to expedite cleanups without forcing authorized States to undergo an additional review.

Hazardous Waste Management System: RCRA Post-Closure Requirements**Hazardous Waste Management System: RCRA Post-Closure Requirements**

EPA is forecasting the proposal of a rule in the winter or spring of 1998 to address RCRA post-closure requirements. The rulemaking will be an amendment of the regulations in two specific areas. First, the rule will address the necessity of a post-closure permit. Current regulations require a permit for facilities that need post-closure care. In some cases a permit is not appropriate due to the post-closure care being met through other mechanisms such as CERCLA actions or through consent agreements. The proposed change would remove the requirement to have a permit in all cases. States and the EPA Regions would have the flexibility to use other methods of assuring

post-closure care. The second area for amendment is that of State authority for compelling corrective action at interim status facilities. Some States have adopted corrective action authority for sites with interim status; however, it is not a requirement. Under this change, States would be required to adopt as part of their RCRA program the authority to compel corrective action at facilities with interim status permits. The EPA believes this amendment would provide a more consistent implementation of corrective action by the States.

Third Circuit Narrows Plaintiffs= Standing - MAJ Mike Egan

The debate over the role of citizen groups= standing to enforce environmental laws has been re-ignited by a controversial decision handed down by the United States Court of Appeals for the Third Circuit. In *Public Interest Research Group of New Jersey (PIRGNJ) v. Magnesium Elektron, Inc. (MEI)*, the Court of Appeals denied the legal standing of environmentalists to bring a citizen suit under the Clean Water Act[1] (CWA) because, according to the court, the plaintiffs were unable to demonstrate a direct link between MEI=s pollution and harm to the water body in question.

The court=s reversal of the lower court opinion set aside a judgment in excess of two million dollars based on one hundred fifty CWA permit violations. Crucial to the appellate court=s determination was the trial testimony of an expert witness called by MEI who opined that MEI=s permit violations had no impact on the water body. This testimony was not contradicted by PIRGNJ.

For an organization to have standing, a plaintiff-member must show: (1) injury in fact, an invasion of a legally protected interest which is concrete and particularized and actual or imminent; (2) a causal link between the defendant=s conduct and the injury; and (3) the likelihood that judicial relief will redress the plaintiff=s injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court of Appeals found that unless there was a direct harm to the water body, there could not be a finding that the injury-in-fact prong of *Lujan* had been satisfied.

The implications of this case and its impact on satisfying the injury-in-fact prong of the standing doctrine theoretically can extend beyond the CWA and into other media such as the Clean Air Act (CAA). Future potential plaintiffs may find it more difficult to prove evidence of a direct harm under the CAA. The potential extension of *PIRGNJ v. MEI* has captured the attention of the environmental bar as it winds its way through the appellate process.

Nuclear Regulatory Commission Cites Firms for Violations Involving Transfer of Exit Signs B MAJ Mike Egan

The Nuclear Regulatory Commission (NRC) has issued a press release announcing that it has cited a New York company for a violation of agency requirements involving the transfer and disposal of AEXIT@ signs containing radioactive material. Although there was no fine imposed upon the company, installations involved in either the demolition or disposal of property should be aware and comply with the NRC requirements if they have any of these signs in their inventory.

The signs in question, which are illuminated without electricity, contain Tritium a substance regulated by 10 C.F.R. '31.5. The requirements of this section are not particularly onerous once the holder of these signs becomes aware of them. Primarily, the holder of these devices must

[1] Federal Water Pollution Control Act, 33 U.S.C. '1251 *et seq*.

ensure that original warning labels remain affixed.[2] Transfers of these devices can only be made when the device remains in that same particular location. In event of transfer, the transferor should provide the new holder copies of the regulatory provisions along with any safety documents provided on the label and notify the NRC within 30 days of transfer. [3]

The NEPA/NHPA Interface - MAJ Tom Ayres

The United States District Court for the Southern District of New York recently addressed the interface between the National Environmental Policy Act (NEPA)[4] and the National Historic Preservation Act (NHPA)[5] in Knowles v. U.S. Coast Guard.[6] In the case, the plaintiffs alleged that the Coast Guard should have prepared an Environmental Impact Statement (EIS) rather than an Environmental Assessment (EA) when closing the Coast Guard Support Center on Governor=s Island, New York. Among other allegations of error, plaintiffs maintained that the Coast Guard was required to prepare an EIS rather than an EA because one of the alternatives considered in the Coast Guard=s EA would have resulted in significant adverse impacts to historic buildings on Governor=s Island. The court found, however, that production of an EIS was not warranted because the Coast Guard did not choose the alternative complained of and because the Coast Guard=s EA and Finding of No Significant Impact (FONSI) were conditioned upon implementation of mitigation measures. The mitigation measures included completion of standard maintenance measures that formed the basis for the FONSI conclusion that there would be no significant adverse impacts to the island=s historic buildings resulting from the closure of the facility.

The court also addressed the timing between the NEPA process and the NHPA consultation process. The plaintiffs claimed that the Coast Guard violated both the NHPA and NEPA when the Coast Guard issued the FONSI prior to completing consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council for Historic Preservation (ACHP) in accordance with the NHPA and its implementing regulations.[7] The Court found that the Coast Guard was not required to complete the consultation process before issuing the FONSI. The Court=s finding, however, relies upon the fact that the Coast Guard discussed the publication of the FONSI with the ACHP prior to publication. The Court also noted that the Coast Guard ultimately entered into a Programmatic Agreement with the SHPO and ACHP wherein both the SHPO and ACHP concurred that the action would not significantly adversely impact historic properties. Installation Environmental Law Specialists should note that a FONSI should not normally be published in advance of SHPO and, if appropriate the ACHP, consultation. The installation should work to receive concurrence from the SHPO and, if appropriate the ACHP, that an agency action will not significantly adversely impact historic properties prior to issuing a FONSI.

:d. Reg. 18,780 (1996).
:d. Reg. 30,798 (1990); 61 Fed. Reg. 8658 (1996).

[2] 10 C.F.R. '31.5(b)(1)
[3] *Id.* at 31.5(c)(9)(i)

[4] National Environmental Policy Act, 42 U.S.C. '' 4321-4370d (1997).

[5] National Historic Preservation Act, 42 U.S.C. '' 470 (1997).

[6] Knowles v. U.S. Coast Guard, No. 96 Civ. 1018 (JFK), 1997 U.S. Dist. LEXIS 3820; 44 ERC (BNA) 2070 (S.D.N.Y. March 31, 1997).
[7] 36 C.F.R. Part 800: Protection of Historic Properties (1997).

J.S. App. LEXIS 20846, 45 ERC (BNA) 1001.

THE ENVIRONMENTAL LAW DIVISION
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Title VI - Is Executive Order 12,898 Growing Teeth? - MAJ Michael A. Corbin

Title VI of the Civil Rights Act of 1964[1] is an emerging environmental litigation issue that has caused the U.S. Environmental Protection Agency (EPA) to start developing policy addressing the influx of Title VI claims. This development affects other federal agencies as they are bound to enforce Title VI through their implementing agency regulations. Today, Title VI is viewed by many as the instrument to give teeth to Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.[2]

The Presidential directive accompanying Executive Order 12,898 directs federal agencies to attempt to ensure compliance with Title VI for federally funded programs affecting human health or the environment.[3] Title VI prohibits federally funded programs and activities from discriminating on the basis of race, color, or national origin. The EPA currently provides about $4.3 billion of Federal financial assistance under 44 different programs to approximately 1,500 recipients. States, who are among these recipients, have recently experienced a substantial increase in Title VI claims that allege they have implemented their federally funded environmental programs in a discriminatory manner.

The federal government has broadly interpreted Title VI claims involving state actions.[4] In a case involving Chester, Pennsylvania, for example, the U.S. Department of Justice (DOJ), on behalf of the EPA, filed an *amicus curiae* brief in the United States Court of Appeals for the Third Circuit that supports a privately enforceable discriminatory effects standard in federal court.[5] This brief specifically rejects the District Court's narrow interpretation of EPA's implementing regulation.

The DOJ argument to the Third Circuit relies on established jurisprudence that clearly supports private parties acting as "private attorneys general" to enforce the mandate of Title

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1 Civil Rights Act of 1964, U.S. Code, vol. 42, sec. 2000d (1964).
2 Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).
3 Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279-280 (Feb. 11, 1994).
4 Title VI claims may include emotional effects according the Department of Interior. In Ward Valley, California, DOI included emotional distress within the scope of discriminatory effects during its investigation of a low-level radioactive waste facility siting.
5 *Chester Residents Concerned for Quality Living, et.al., v. James M. Seif*, No. 96-3960, U.S. District Court E.D. Pa. (November 5, 1996).

VI and the implementing regulations.[6] It also asserts that according to the EPA, the proponent of the regulation, a private individual can have standing to bring a claim alleging that the EPA's funding recipients not administer their programs in a manner that causes unjustified, unintentional discriminatory effects.[7] If the Third Circuit adopts the DOJ proposition, then private party plaintiffs may prevail without meeting the often-overwhelming burden of proving discriminatory intent.

The increase of Title VI claims represents a trend that could significantly affect Army environmental programs, policies, and practices. Obviously, Title VI challenges could adversely impact Army actions by causing delay, termination or serious public scrutiny of Army environmental programs. Therefore, in accordance with the Department of Defense, Strategy on Environmental Justice, the Army should seriously reconsider programs, policies, and practices that could be adversely affected by Title VI litigation.

Services and OSD Meet with EPA to Talk Stormwater - MAJ Silas DeRoma

On 18 November 1997, representatives from the Services and OSD met with the EPA Office of Water to discuss the EPA's upcoming Stormwater Phase II Rule. The proposed rule will provide a comprehensive stormwater program that designates and controls additional sources of stormwater discharges to protect water quality. Current regulations, commonly known as Stormwater Phase I, only apply to stormwater discharges associated with certain industrial activities, certain municipal separate storm sewer systems,[8] stormwater discharges with permits issued before 4 February 1987, and those stormwater discharges determined to violate water quality standards or significantly contribute pollutants to the waters of the United States.

The proposed regulation will require National Pollutant Discharge Elimination System (NPDES) permits for small municipal separate storm sewer systems (MS4) located in any incorporated place, county, or place under the jurisdiction of a governmental entity within an . . . "urbanized area."[9] The regulation will require such owners or operators to develop, implement, and enforce a local stormwater management program designed to reduce the discharge of pollutants to the maximum extent practicable and to attain water quality standards. The permitted small MS4 must also describe management practices to be

[6] See *Cannon v. University of Chicago*, 441 U.S. 677, 705-706 (1979); *Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317, 319 (3d Cir. 1982), *cert.denied*, 463 U.S. 1229 (1983).

[7] Brief of the United States as *Amicus Curiae* in Opposition to Defendants' Motion to Dismiss, *Chester Residents, et.al. v. Sief et.al.*, No 96-3960, U.S. District Court E.D. Pa. (August 23, 1996), 9-22.

[8] Phase I regulated those municipal separate storm sewer systems serving populations from 100,000 to 250,000 and also those municipal separate storm sewer systems serving populations greater than 250,000.

[9] Those owners or operators outside of an urbanized area may be included under the regulations if they have existing or potential significant water quality impacts, as determined by criteria set by their respective permitting authorities. The proposed regulations also will apply to construction activities greater than 1 acre.

implemented and measurable goals for each of the following minimum control measures:

1. Public education and outreach on stormwater impacts
2. Public involvement/participation
3. Detection and elimination of illicit connections and discharges
4. Control of construction site stormwater runoff
5. Post-construction stormwater management in development/redevelopment.

DoD asked to meet with EPA because EPA included federal facilities in the definition of "municipal" separate storm sewer systems in the proposed regulation. The EPA also stated in the proposed regulation that federal facilities were included in this definition to "address an omission from existing regulations and to clarify that federal facilities are . . . covered by the NPDES program for municipal stormwater discharges when the federal facility is like other regulated municipal storm sewer systems." The DoD representatives provided several illustrations to EPA of cases where application of municipality requirements would create burdensome regulatory requirements for installations or would not be feasible. For example, requirements for public outreach/participation are not always necessary on a military installation where an installation commander can regulate environmental impacts by establishing uniform standards and practices for on-post housing areas. Also, military installations usually have neither permit authority nor the administrative capability to monitor construction activities on their installations to the same extent as a municipality that is often also acting as the permit authority for construction activities.

The EPA acknowledged the DoD comments, noted that some of the circumstances raised had not been considered, and agreed that in some cases application of the requirements would be unfeasible. Consequently, the EPA invited DoD comments on the proposed regulations after they are issued - at some time near the end of 1997. Installation ELSs are encouraged to examine the proposed regulation when it is issued and discuss its impacts with their installation environmental staff. ELD will be providing comments to EPA and installation-specific examples from the field are encouraged. To obtain a copy of the proposed rule, go to **Error! Bookmark not defined.**. Click on "FACA," click on "Storm Water Phase 2 FACA Subcommittee Area," and select "Preamble and Rule Preliminary Drafts." Please be aware that the version available at this site is expected to be slightly different from the version to be released.

Negotiations on North American Agreement on Transboundary Environmental Impact Assessment- MAJ Mike Egan

As part of the North American Free Trade Agreement (NAFTA) legislation,[10] the NAFTA parties entered into the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC in turn established a Council of Environmental Cooperation (CEC), which consists of the environmental ministers of the three NAFTA parties. Article 10.7 of the NAAEC calls upon the Council to develop recommendations with a view to agreement with respect to notification, consultation, assessment, and mitigation concerning certain proposed projects likely to cause significant adverse transboundary impacts. Accordingly, in June 1997, the Council issued a resolution announcing the decision of the parties to negotiate and complete a legally binding agreement on transboundary environmental impact

[10] 19 U. S. C. 3301 (1997)

assessment (TEIA Agreement). This resolution set a target date of April 1998 for completion of the TEIA Agreement.

The Administration supports the negotiation of a TEIA Agreement, as it would establish a formal process for obtaining notification at an early stage of proposed Canadian and Mexican physical projects that are likely to have significant adverse impacts on the U.S. environment and for voicing U.S. concerns. The TEIA Agreement would, therefore, provide the United States government and its citizens with an opportunity to participate in Canadian and Mexican governmental decisions about projects to ensure that U.S. concerns are taken into account.

Representatives from the services and OSD are participating in an interagency working group, chaired by the State Department, to formulate the U.S position to be taken in negotiations with Canada and Mexico. One representative from DoD has taken part in the first two negotiating sessions held in Montreal, Canada, on September 11-12 and November 17-18, respectively. U.S. negotiators have and will continue to focus on ensuring that the TEIA Agreement includes the following principal elements:

Notification. There will likely be two bases for notification: (1) designated categories of physical projects located within 100 km of the United States-Mexico and United States-Canada borders without a requirement for an individualized determination of transboundary environmental impacts; and (2) proposed projects that the originating country determines have the potential to cause significant adverse transboundary environmental impacts even if not located within 100 km of the border. The U.S. proposal provides that, for the United States, with the exception of notification of projects permitted by the states pursuant to programs authorized by the Environmental Protection Agency, only major actions as defined under the National Environmental Policy Act (NEPA) subject to decisions by the U.S. Federal government would be included in the scope of the TEIA Agreement.

Information Sharing Between Countries. The TEIA Agreement should provide for the timely and open exchange of pertinent information and views regarding proposed projects.

Assessment. Whereas notification of a proposed project is to be based in part on an automatic trigger, e.g. proximity to the border, the obligation to perform a transboundary environmental impact assessment would be triggered by a determination that the project is likely to cause significant adverse transboundary environmental impacts. This standard is similar to the standard for determining whether an Environmental Impact Statement (EIS) is required under U.S. law. The country in which the a proposed project would be located would make the determination whether a transboundary environmental impact assessment is required. Once a determination is made, the potentially affected country and its public would be given the opportunity to provide comments on and participate in the assessment process, including public hearings, subject to national laws and regulations.

Mitigation. The TEIA Agreement is expected to require countries to consider measures to mitigate significant adverse transboundary environmental impacts as early as possible during the transboundary environmental impact assessment process.

Public Participation. Public participation will be critical to the success of the transboundary environmental impact assessment. Procedures under the TEIA Agreement will provide the publics of all affected parties the same access to information and opportunities for participation.

Involvement of States. Given existing law, the TEIA Agreement will need to be limited to federal actions. It should be noted, however, that federal actions affected by the TEIA Agreement would include state and local actions proposed for federal funding, permitting, licensing, or other approvals. In addition, a TEIA Agreement would affect state, local, and tribal governments who participate in the implementation of federal environmental assessment laws, specifically those governments who presently administer certain Department of Housing and Urban Development NEPA programs. In light of the critical role the states and tribes play in U.S. environmental programs, the administration believes that voluntary state and tribal involvement is an important component of the overall approach to TEIA. Some border states and Indian Tribes currently have procedures for consultation with neighboring Mexican states or Canadian provinces. State and tribal officials were included in the U.S. delegation to the CEC intergovernmental group that developed the TEIA recommendations, and the U.S. delegation has included state and tribal observers at previous negotiating sessions. Additionally, the Department of State and other involved U.S. Executive Branch agencies will be consulting with officials from border states during the negotiations to ensure that the TEIA Agreement is developed in a manner consistent with ongoing U.S.-Mexico and U.S.- Canada border initiatives.

Implementation. The U.S. expects to use existing procedures under U.S. law to implement a TEIA Agreement.

Environmental Issues in Outsourcing and Privatization - Major Lisa Anderson-Lloyd

In this time of reduced funding, outsourcing and privatization are two alternatives by which installations can ensure that Army functions and services meet mission requirements while conforming with increasingly stringent environmental regulations. Privatization is the transfer of ownership, operation, maintenance, and improvement of Army utility plants and systems to a municipal, private, local, or regional utility authority. Outsourcing is a contracting out of those functions and services that are not considered “core” competencies of the installation.

Outsourcing

Outsourced environmental activities fall within the following areas: environmental compliance, pollution prevention, waste disposal, and environmental remediation. In the area of compliance, some installations have outsourced their technical environmental engineering support to obtain the necessary assistance for their overburdened environmental program. In order to achieve and maintain environmental compliance, installations often contract for monitoring and testing required by permits or statutes. Carefully drafted contract provisions and contractor oversight are essential to ensure the validity of the test results and their acceptability to the regulators. Installation personnel must monitor the methodology used by the contractor to guarantee appropriate sampling and laboratory methods are being used.

Pollution prevention and hazardous waste minimization programs are a focus for many installations in outsourcing. Not only can installations reduce hazardous waste disposal costs, but they may also reduce potential liability for future hazardous waste cleanups. It is Army policy to reduce the quantity or volume and toxicity of hazardous waste generated by Army operations and activities when it is economically feasible or environmentally sound. The procurement process is the means to obtain pollution

prevention equipment as well as services. One method that avoids the traditional treatment of waste is recycling. When contracting to recycle hazardous waste, contracting and environmental personnel must ensure that new regulatory and policy considerations concerning recycling are included in the solicitation.

In the area of waste disposal, there are many requirements to consider in addition to the Resource Conservation and Recovery Act waste management regulations, including hazardous waste training, transportation requirements, and additional State and local requirements. The Defense Reutilization Marketing Service (DRMS) is the DoD agent for disposal of hazardous waste generated by the Army (AR 200-1, paragraph 5-3,e (3)). In that capacity, DRMS manages most hazardous waste disposal contracts at installations. Although the use of DRMS is preferred, exceptions allowing the contracting out of hazardous waste disposal is allowed in some instances with MACOM approval. Contracting outside DRMS is performed routinely for the disposal of non-hazardous waste and for waste that DRMS does not handle.

All contracts for hazardous waste disposal must be reviewed by the installation Environmental Coordinator and the Director of Contracting and approved by the Installation Commander. The contractor selection process must include the verification of necessary permits and the contractor's compliance status with regulatory agencies. Both the technical capability of the contractor and an evaluation of previous performance history should be scrutinized. To contract out waste disposal, a detailed description of the waste, including all necessary treatment and disposal requirements must be submitted to bidders. In addition, the prospective contractors must be required to develop a detailed disposal plan to ensure an adequate evaluation of their expertise to dispose of the particular waste.

Although the U.S. Army Corps of Engineers is primarily responsible for managing contracts relating to the Installation Restoration Program (IRP), installations may at times contract in support of IRP remediation activities. The installation is responsible, however, for other remediation contracts such as underground storage tank and asbestos management. It is essential in these contracts to include in the specifications all related tasks that the contractor may need to accomplish. These would include requirements for permits, licensing, training, sampling, monitoring, and regulator notification. Most importantly, installation personnel must stay alert to changing environmental regulations that will affect on the contractor's performance requirements.

Government liability for environmental compliance issues under outsourced activities will vary depending on the terms of the negotiated contract. If the contract is properly drafted, the government should be responsible for an environmental violation only when the deficiency is at the direction of the government, by the terms of the contract, or due to an inadequate government facility. The contract must reflect the intended allocation of risk to the contractor, and the contractor should be required to submit environmental compliance plans as early as the source selection evaluation. Environmental compliance must be made the contractor's responsibility (including obtaining licenses and permits), and failure to comply with laws and regulations should be a basis for termination of the contract for default or other adverse action.

An issue that frequently arises in outsourcing is permit responsibility. It is preferable that the contractor be made responsible for obtaining the permits. This does not, however, insulate the installation from liability for violations of the permit, as explained above. The Installation Commander would sign the permit application for the installation and any sub-installation or supported facilities as the facility "owner," while the contractor would sign as

the "operator." Care should be exercised to delineate responsibilities in the contract, to include payment of fines and penalties levied against the installation as a result of contractor noncompliance.

Absent specific statutory authority, the government cannot enter into indemnity agreements with contractors. There are statutes that authorize indemnification within certain research and development contracts and provide indemnity to cover unusually hazardous risks arising out of the direct performance of the contract. The latter is used to provide indemnification to ammunition plant contractors. The indemnification generally protects the contractor against claims (including litigation or settlement) for personal injury, death, and property damage as a result of a risk defined in the contract.

National Environmental Policy Act (NEPA) requirements must be considered in outsourcing functions and services. Outsourcing may qualify for a categorical exclusion IAW AR 200-2. If the screening criteria in AR 200-2 apply to the proposed action and the action qualifies for the categorical exclusion, the more extensive Environmental Assessment (EA) or Environmental Impact Statement (EIS) will probably not be necessary.

Privatization

Unlike outsourcing, privatization involves a complete transfer of ownership, operation, maintenance, and improvement of an Army facility – typically utility plants and systems. The transfer of these facilities is usually to a municipal, private, local, or regional government entity. Under privatization agreements, the installation shifts from a utility provider to a utility customer. The Army's goal is to privatize one hundred percent of natural gas systems and seventy-five percent of all other utilities by the year 2003.

Through full privatization, the government as a customer avoids liability as either the owner or the operator for compliance with environmental requirements. Typically, under the terms of the transfer, the new owner is responsible for all environmental compliance requirements, as well as maintenance costs, renovation and construction, equipment, manpower, and overhead. The fact that the new facility owner has assumed the permit responsibility does not relieve the Army of all environmental compliance requirements. For example, in the case of a wastewater treatment plant, although the owner is responsible for permitting and operation of the plant, the government as a tenant is responsible for control of the waste streams within the government's buildings.

A private owner's liability for fines and penalties incurred in connection with a facility may be different from the Army's liability because Federal sovereign immunity has not been waived under all environmental statutes. Therefore, even if the Army is responsible for a fine, reimbursement of the private owner may not be permissible. Regardless of whether sovereign immunity for punitive fines and penalties has been waived, the Army is obligated to comply with applicable Federal, state, interstate, and local requirements. Another issue that may arise in connection with privatization is that of remediation of transferred facilities. The facility transfer documents should address any obligation the Army has to clean up Army-caused contamination.

It is unlikely that indemnification would apply in most cases of privatization. Current statutory authority to enter into indemnity agreements would not allow such agreements with private or governmental entities that would take over ownership of Army utilities or wastewater systems.

NEPA must also be considered in any privatization initiative. As there is no categorical exclusion that applies to privatization actions, a proponent must prepare either an EA or an EIS. Because the environmental effects of privatization are rarely significant, however, an EA will normally suffice to determine the extent of environmental impacts.

Conclusion

In many cases, the Army lacks the manpower, funds, and specialized technology to ensure that utility systems reliably meet mission needs. Often funding is insufficient to achieve current industry standards or to satisfy increasingly stringent environmental regulations. Privatization is the preferred solution to these problems. In some cases, however, privatization of facilities is not feasible due to significant disrepair, remote location, or other reasons. If facilities are not reasonable candidates for privatization they should be considered for outsourcing. In either case, privatization and outsourcing initiatives are often economically advantageous, but the decision to outsource or privatize will not obviate all environmental responsibilities. Consequently, prior to executing those decisions, installation commanders should carefully review what liabilities remain and ensure the installation can meet the requirements.

EPA Environmental Management Reviews

1. What are Environmental Management Reviews?

An Environmental Management Review (EMR) is an evaluation of an individual Federal facility's program and management systems to determine how well the facility has developed and implemented specific environmental protection programs to ensure compliance.

Two EPA Regions (I and VI) have been conducting EMRs over the past few years. Encouraged by the success of their efforts, EPA Headquarters recently issued (May 31, 1996) an interim final policy and technical guidance on conducting EMRs at Federal facilities. The interim policy stipulates that EMRs will be conducted as part of a pilot program. Upon completion of the pilot at the end of FY 1997, EPA intends to identify any lessons learned, modify the policy as appropriate, and implement a final EMR policy.

2. How do EMRs compare with other on-site assessments?

EMRs are consultative technical assistance visits intended to identify root causes of environmental performance problems. EMRs are not compliance-oriented assessments, audits, or inspections, nor are they pollution prevention opportunity assessments. They are voluntary and are initiated by the recipient agency or facility.

3. How can my facility benefit from an EMR?

EMRs help Federal facilities improve long-term environmental compliance by developing a sound foundation for an environmental management program. They assist Federal facility personnel in moving beyond immediate symptoms of noncompliance and address underlying problems or root causes. In addition, they may provide an early warning of potential compliance problems. EMRs foster improved working relationships with EPA and encourage an open dialogue on environmental concerns. EMRs also provide informal assessments that are less costly than management assessments conducted by a facility's contractor, and they provide an independent perspective on prior self-assessment activities.

4. How is the scope of an EMR determined?

EMRs are collaborative efforts between EPA and a Federal facility in which the facility has ultimate authority in determining the scope of the review. There are seven potential areas of inquiry for an EMR: organizational structure; management commitment; resources; formality of program; communications; evaluation and reporting; and planning and risk management. A typical EMR may address any of these areas, and will take from one to three days to conduct. Once EPA evaluates the results of the EMR, the facility receives a written report.

5. Who actually conducts the EMR?

EMRs are conducted by a team of EPA Regional staff with the assistance of qualified contractors, when appropriate. Throughout the EMR process, the team will coordinate closely with Federal facility personnel.

6. How does the EMR process work?

The EMR process typically begins either with an expression of interest by a Federal facility or an EPA inquiry. If, after preliminary discussions, the facility elects to proceed, the EMR planning stage begins.

During the planning stage, EPA staff and Federal facility management will discuss the purpose and scope of the EMR, the ground rules and operating principles for conducting the review, and they may sign a ground rules letter.

EPA and Federal facility personnel may continue regular telephone discussions and correspondence (e.g., pre-site visit questionnaire) to further refine the scope and content of the EMR. During these communications, EPA and the Federal facility will identify technical points of contact. In addition, EPA may work with facility staff to develop a list of information needs (e.g., documents) and persons to be interviewed as part of the site visit, as well as a schedule for the on-site portion of the EMR. The schedule will be customized to address the size and complexity of the facility.

Prior to the site visit, EPA staff will review and evaluate the environmental management program documents identified during the planning stage (e.g., environmental policies, directives, protocols, and standard operating procedures). Careful review prior to the site visit will ensure that EMR staff are sufficiently familiar with facility operations to conduct effective on-site interviews and evaluations.

Although compliance assessment is not the intent, occasionally during the course of an EMR, the team may discover a potential violation. To address this issue, EPA has developed an Incidental Violations Response Policy (IVRP). In situations that may cause an imminent and substantial endangerment to public health or the environment, or serious actual harm, the facility must address the situation immediately. In other cases, EPA allows the facility a 60-day correction period and a waiver of certain potential penalties, subject to formal disclosure of the violation by the facility and the initiation of appropriate corrective action. The IVRP is included within EPA's Interim Technical Guidance on EMRs and should be reviewed to obtain more details.

At the conclusion of the site visit, the EMR team may provide an exit briefing in which preliminary findings are presented to facility management.

Within 60 days after the site visit, the EPA Regional Office will provide the facility with a written report or letter discussing the conclusions of the EMR and making recommendations for follow-up activities. The facility must prepare a written response to the EMR report within 60 days explaining how it intends to address any issues raised by the report. In addition, six months after this response, EPA will ask the facility to provide a brief progress report on the status of any follow-up activities.

7. **How will EMR reports be used?**

The final EMR report is a public document, and as such may be obtained by any member of the public who follows proper procedures. However, it is not EPA's intent to actively distribute or otherwise make a report available to the general public or State/local officials. In addition, the EMR can serve as a foundation for on-going technical and compliance assistance activities between EPA and the Federal agency or facility.

8. **Who can I contact to obtain more information?**

If your facility is interested in participating in an EMR, or would like to obtain more information on the program, please contact your Regional Federal Facility Coordinator.

EPA Regional EMR Contacts

I Anne Fenn (617) 565-3927
II John Gorman (212) 637-4008
III Eric Ashton (215) 566-2713
IV Dave Holroyd (404) 562-9625
V Lee Regner (312) 353-6478
VI Joyce Stubblefield (214) 665-6430
VII Jamie Bernard-Drakey (913) 551-7400
VIII Dianne Thiel (303) 312-6389
IX Sara Segal (415) 744-1569
X David Tetta (206) 553-1327

EPA Headquarters Federal Facilities Enforcement Office

Andrew Cherry (202) 564-5011

The Environmental Leadership Program (October 1997)

As part of the U.S. Environmental Protection Agency‘s (EPA) ongoing efforts to improve environmental performance, encourage voluntary compliance, and build working relationships with stakeholders, EPA developed the Environmental Leadership Program (ELP). Initiated in April 1995, the one year pilot program has been completed, and EPA plans to launch its full-scale Leadership Program in late 1997.

What Are the Goals of the ELP?

The goals of the Environmental Leadership Program include:

- Better protection of the environment and human health by promoting a systematic approach to managing environmental issues and by encouraging environmental enhancement activities (e.g., biodiversity, energy conservation);
- Increased identification and timely resolution of environmental compliance;
- Multiplying the compliance assistance efforts by including industry as mentors; and
- Fostering constructive and open relationships between agencies, the regulated community, and the public.

Who May Be Eligible to Be An ELP Participant?

Any public, private, or federal facility that meets the following ELP criteria for environmental leadership can apply to be an ELP participant.

- A facility is expected to have a mature environmental management system (EMS) that conforms to the ELP EMS. The criteria for an ELP EMS are outlined in the ELP EMS fact sheet (EPA 305-F-96-011).
- A facility should have a compliance and EMS auditing program. This can be demonstrated by a facility submitting or making available facility-wide compliance audit results and EMS information (data or results documentation) obtained from the past 2 years. In addition, the application should include the dates and a summary of the findings from any agency regulatory inspection(s) conducted in the past 2 years.
- As part of its EMS, a facility should implement community outreach/employee involvement programs. Such programs foster the development of relationships between facilities and two of their major stakeholders--local communities and employees.
- Federal facilities need to verify that their parent Agency endorses the Code of Environmental Management Principles (CEMP) and briefly describe how the applying facility is implementing the CEMP. ELP has been adopted as the Model Installation Program for federal facilities under EO 12856.

What Are the Benefits of the ELP?

Benefits to the Environment are anticipated from the Program's focus on encouraging environmental enhancement activities, such as environmental restoration projects and product stewardship.

The Program will facilitate an exchange of information and encourage the implementation of best practices related to environmental management systems and pollution prevention activities.

The ELP provides an opportunity to foster constructive relationships between the ELP participants, regulators, and the public. Building productive working relationships among environmental stakeholders may lead to tangible benefits for the environment and public health, especially if regulatory resources can be effectively redirected to focus on environmental "bad actors" and expanded compliance assistance efforts.

The Formal Recognition include:

- Public Recognition - EPA will issue certificates of participation in the ELP and develop programs and activities designed to publicly recognize ELP facilities at federal, regional, state, and local levels.
- Logo Usage - Participant facilities can use the EPA-issued ELP logo in facility (but not product) advertising, on facility equipment and structures, and internally, on stationery, coffee mugs, T-shirts, jackets, etc.

The Inspection Discretion benefits include:

- Through the use of their enforcement discretion, participating regulatory entities will reduce and/or modify discretionary inspections.

Due to the leadership and exemplary environmental performance of ELP participants, other benefits, such as expedited permits, longer permit cycles, and streamlined permit modifications may become available at a future time.

How Will Noncompliance Issues Be Addressed?

The following outlines the proposed approach in addressing issues of noncompliance during participation in the full-scale ELP:

- ELP participants will follow all reporting requirements mandated by federal and regulatory entities' law, permit conditions, consent decree or order. The ELP Leadership Agreement may include modifications to such requirements consistent with other Agency policies. Participants must also disclose all instances of environmental noncompliance detected and corrected in the Annual Report. EPA or the appropriate participating regulatory entity will inform the participant facility in writing whether penalty mitigation for the disclosed noncompliance is appropriate.
- Participants will have 60 days to correct noncompliance, unless participants are required by law to correct noncompliance in a shorter period of time. The correction period applies to noncompliance detected during any EPA, State or local inspection, identified through the facilities' management system, or recognized during ELP required audits. The 60-day correction period will begin on the date of detection of the noncompliance. During that period, participants shall correct the noncompliance, including prevention of recurrence and remediation of harm to human health or the environment. Where the facility detects noncompliance that presents imminent and substantial endangerment to human health or the environment, the facility must notify all the signatories to the Leadership Agreement immediately, and correct the noncompliance immediately, including prevention of recurrence and remediation of harm.
- Within 60 days of detection, participants must describe in writing any noncompliance (required to be reported or otherwise) that cannot be corrected in 60 days, to EPA and the participating regulatory entities. If the noncompliance cannot be corrected within 60 days of detection, each case will be reviewed to determine if the correction period may be extended for an additional 60 days, or other appropriate time period. The extension must be requested in writing and be submitted to the federal and other participating regulatory entities.

EPA recognizes that some noncompliance can and should be corrected immediately, while others (e.g. where capital expenditures are involved), may take longer than 60 days to correct. When reviewing the extension request, EPA and the regulatory entities will review each case to determine if substantial steps were taken to ensure correction and remediation efforts were taken promptly. Substantial steps include applying for necessary permits, securing financing, ordering equipment, and other similar actions.

If the request is approved, the EPA, the other participating regulatory entities, and the facility will commit in writing to a new schedule that will include the necessary facility actions to ensure compliance with the law, prevent recurrence of the violation(s), and remediate any environmental harm caused by the

violation(s). EPA and the other participating regulatory entities reserve the right to verify, through inspection or other means, that the noncompliance has been corrected.

- EPA and participating regulatory entities will not proceed with a civil penalty action unless the violations:
  - Are criminal in nature
  - Result in serious actual harm
  - May present imminent and substantial endangerment to the public health or the environment
  - Are recurrences of violations for which a prior enforcement response has been taken or for which the facility has previously received penalty mitigation by EPA, State or local agency
  - Are of a specific term(s) of any order, consent agreement or plea agreement
  - Remain uncorrected after the 60 day extension
  - Result in an economic benefit which has accrued or been realized as a result of the noncompliance. (Economic benefit will be determined under the applicable EPA policies on a case-by-case basis. EPA and other participating regulatory entities may choose to waive a penalty due to the insignificant amount of any economic benefit).
- EPA and the other participating regulatory entities retain their enforcement discretion to review all noncompliance (whether they are reported under the ELP Enforcement Response Guidelines or discovered otherwise) to determine whether an enforcement response is appropriate. If an enforcement response is determined to be appropriate during participation in the ELP, the applicable Agency enforcement response policies will apply.

What Roles Will EPA and Other Regulatory Entities Play in the ELP?

For the ELP to be truly effective, facilities should be recognized as environmental leaders by EPA and other participating regulatory entities, as appropriate. The program has been designed with the expectation that EPA and the State, at a minimum, (but also other applicable levels of government) will work in participation to review applications, participate in on-site reviews, select facilities, and implement the program. It is anticipated there will be a signed agreement between EPA and other participating regulatory entities detailing respective roles and responsibilities. A model EPA-State agreement has been developed.

Several States have or are in the process of developing their own environmental leadership programs. It is hoped that EPA and State efforts can be coordinated to provide the greatest benefit to qualified facilities, minimize duplication of effort and confusion resulting from multiple, similar programs, and conserve limited regulatory resources.

To partner in the implementation of ELP, other interested regulatory entities are encouraged to sign an Agreement with EPA agreeing to the program requirements. If a regulatory entity wishes to add requirements or identify additional benefits, this may be included in the Agreement.

Besides selecting the facilities, EPA and the States will maintain an oversight role. It is important to remember that EPA and States are not surrendering or diminishing their authority to administer/enforce environmental laws. EPA will inspect facilities in cases of:

- Imminent and substantial endangerment to public health or the environment
- Natural resource damage
- Receipt of a tip, complaint, or other information concerning potential civil or criminal violations
- Due cause.

EPA hopes to partner with the States to offer benefits (recognition, reduced inspections, expedited permitting, etc.) from both EPA and the State to the facilities.

NEXT STEPS:

- Federal Register notice of proposed full-scale program in Fall 1997

〈 Anticipated availability of the application for the program in late 1997/early 1998 through the Pollution Prevention Information Clearinghouse (PPIC) or via the ELP web site. (http://es.inel.gov/elp)

FOR MORE INFORMATION CONTACT:

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Water Conservation Measures At Army Installations

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The federal government is the largest consumer of energy in the United States. The Department of Defense is responsible for consuming over 70 percent of the energy used by the federal government. Over the years, Congress has attempted to reduce federal energy use through legislative initiatives, including the Energy Policy and Conservation Act, as amended by the Energy Policy Act of 1992. The Energy Policy Act of 1992 requires a reduction in federal energy consumption. It sets as a goal, a 20 percent reduction in federal energy consumption by the year 2000 (with 1985 as the baseline year). In 1994, President Clinton issued Executive Order 12902, Energy Efficiency and Water Conservation at Federal Facilities. The executive order sets a new goal; a 30 percent reduction in energy consumption by the year 2005. The executive order also specifically mandates ìcost effectiveî water conservation projects. This paper addresses the Armyís response to the water conservation mandate.

The Department of Defense (DoD) is required to set an energy performance goal pursuant to 10 U.S.C. ß2865. It has adopted the goals outlined in E.O. 12902. Under 10 U.S.C. ß2865 and 10 U.S.C. ß2866, DoD receives incentives for energy and water cost savings. ìTwo-thirds of the portion of the funds appropriated to [DoD] for a fiscal year that is equal to the amount of [savings] realized by the Department ... shall remain available for obligation ... through the end of the fiscal year following the [one] for which the funds were appropriated.î One half of these funds are used to implement additional energy and water conservation measures. The other half of the funds are used at the installation where the savings occurred, to be used by the commander for improvements in housing, unspecified minor construction projects ìenhancing quality of life of personnel,î or for morale, welfare and recreation.

Water conservation measures range from simply turning off the water faucet to treating and reclaiming industrial waste water. Common examples of water conservation include leak detection and repair, changes in irrigation and landscaping practices, retrofitting plumbing fixtures, and servicing water heater systems. The term, water conservation measure, generally has two meanings in the federal sector. It means a building water system ìthe nature or selection of which for a new building influences significantly the cost of water consumed.î It also means ìmeasures that are applied to an existing Federal building that improve the efficiency of water use, reduce the amount of water for sewage disposal and are life cycle cost effective and that involve water conservation, improvements in operation and maintenance efficiencies, or retrofit activities.î

The Department of the Army, Assistant Chief of Staff for Installation Management (ACSIM) and the Army Corps of Engineers (COE) are primarily responsible for implementing the Armyís response to the Energy Policy and Conservation Act and E.O. 12902. ACSIM directs the Armyís Federal Energy Management Program (FEMP). The COE provides technical and contracting assistance for the Armyís Energy Savings Performance Contract Program (ESPC). The U.S. Army Engineer and Support Center in Huntsville, Alabama has been designated as the Technical Center of Expertise for this

program. The COE Center for Public Works provides technical and contracting assistance for water conservation measures for the Armyís Facilities Management Program.

The Army FEMP funds installation energy and water conservation projects. Each fiscal year, installations provide their MACOM with a list of project requests for the FEMP. The requests must describe the project, provide a life cycle analysis, and provide the projectís savings to investment ratio (SIR). The SIR is the ratio of the present value savings to the present value costs of an energy or water conservation measure. The MACOMs forward a list of those projects with the best SIRs to ACSIM. The ACSIM then provides a final list to the Army Budget Office. The FEMP projects are paid for by OMA funds, which go to the MACOMs for distribution to the installations. An installation can prepare its own water conservation project request package. It also can request assistance from the COE Huntsville office, which will prepare the package for the installation. It charges a fee for the administrative costs incurred in the preparation.

The COE provides technical and contracting assistance for the Armyís Energy Savings Performance Contract Program. Energy savings performance contracts are contracts in ìwhich the contractor incurs the cost of implementing energy savings measures.î The contractor is responsible for ìperforming the audit, designing the project, acquiring and installing equipment, training personnel, and operating the maintaining equipment.î The contractor receives a ìshare of any energy cost savings directly resulting from implementation of such measures during the term of the contract.î These contracts are awarded based on best value to the government, not lowest price. The government incurs no capital costs. It does, however, incur administrative costs for developing solicitations, evaluating proposals and administering the contract. It also must share savings with the contractor. Contracting officers, therefore, should first attempt to secure government funding for the project. The government would not have to share energy savings under the more traditional contract methods.

Water conservation measures are not included in ESPCs. For example, if a contractor volunteered a proposal that would save gallons of water, it could not be awarded under an ESPC. Water conservation, however, is permissible as an ancillary benefit of an ESPC. An ESPC, therefore, would be proper if a contractor proposed a project that involved reduced electricity consumption because of efficient electrical pumping which reduced the gallons of water pumped.

Installations can engage in energy savings performance contracting or pay Huntsville to develop and secure the contract. According to the COE ESPC Project Manager, Huntsville soon will enter into regional contracts for these services that will be available to all government agencies. The installations then will be able to secure these services in less time and at less cost than the installation. Generally, it takes an installation 18 months to secure an ESPC, at a cost of $120,000.00. Huntsville will be able to issue a task order to the regional contractor in less than 2 months, at a cost of $10,000.00.

The COE Center for Public Works provides technical and contracting assistance for water conservation measures for the Armyís Facilities Management Program. The Facilities Management Program conducts water conservation surveys and audits for installations who request it. They also will secure a contractor to conduct the survey at the installationís request. The Facilities Management Program gives installations technical advice about the required specifications for water conservation products, such as showerheads, faucets, toilets, and urinals. They will evaluate potential contractors, their products, and their contract proposals for installations. These are important considerations. The Federal Acquisition Regulation states that ìagencies shall consider energy-efficiency in the procurement of products and services.î

The Department of Defense has adopted the energy efficiency and water conservation goals contained in E.O. 12902 as its own. The Army is actively implementing programs to meet those goals. Contracting officers and contract law attorneys interested in fully participating in these programs should contact the Army Corps of Engineers Center for Public Works and the Army Engineer and Support Center at Huntsville, Alabama for more information.

* The author wrote this article while assigned as a student at the 45th Judge Advocate Officer Graduate Course, The Judge Advocate General School, United States Army, Charlottesville, Virginia.

General Accounting Office Report 96-215 (1996).

Department of Defense Annual Report to Congress (1996).

Pub. L. 96-103, 89 Stat. 871 (codified at 42 U.S.C. ß6201 et seq.) (1996).

Pub. L. 102-486, 106 Stat. 2776 (codified at 42 U.S.C. ß6201 et seq.) (1996).

Exec. Order No. 12902, 59 Fed. Reg. 11463 (1994).

Cost effective means ìproviding a payback period of less than 10 years, as determined by using the methods and procedures developed pursuant to 42 U.S.C. ß8254 and 10 CFR Part 436.î Id.

10 U.S.C.A. ß2865(a) (West, 1997) (Energy Savings at Military Installations).

Annual Report, supra note 2.

10 U.S.C.A. ß2866 (West, 1997) (Water Conservation at Military Installations).

10 U.S.C.A. ß2865(b)(1); 10 U.S.C.A. ß2866(b).

10 U.S.C.A. ß2865(b)(2)(A); 10 U.S.C.A. ß2866(b).

10 U.S.C.A. ß2865(b)(2)(B); 10 U.S.C.A. ß2866(b).

10 CFR ß436.11 (1996) (Federal Energy Management and Planning Programs). The Department of Energy is the lead agency for implementing E.O. 12902, through its Federal Energy Management Program (FEMP). 59 Fed. Reg. supra note 5.

10 CFR ß436.13.

10 CFR ß436.21.

According to the ESPC Project Manager, Mr. Bobby Harman, the MACOMs decide whether a project actually will be funded. The FEMP is working on a procedure to secure status reports on how the money actually is used.

See 10 U.S.C.A. ß2865 (c)(1). (1997). Mr. Harman is the Project Manager for the ESPC Program. He can be reached at (205) 895-1528. He speaks very highly of his legal counsel, Ms. Barbara Simmons, and recommends that contract law attorneys contact her if they have any questions on the program. She can be reached at (205) 895-1100.

E.O. 12902, supra note 5.

Id.

Id.

GAO Report supra note 1.

42 U.S.C. ß8287(c) (West, 1996). See also Federal Energy Management and Planning Program, 60 Fed. Reg. 18326-01 (1995); 10 CFR Part 436 (1996).

This information was provided by Mr. Harman, ESPC Project Manager. He also referred to another program, the Energy Conservation Investment Program, which is a sub-section of the MCA. He stated there has been very little contracting from this program over the years.

Ms. Jane Anderson and Ms. Nicole Lussier are the POCs for this program. They can be reached at (703) 806-5214 (DSN prefix is 656).

Huntsville also will conduct energy and water surveys and audits for installations. It recently concluded water main surveys of Fort Riley and Fort Campbell. Both systems have major leaks.

The Energy Policy and Conservation Act established energy consumption standards for certain ìcovered products.î See 42 U.S.C.A. ß6295 (1996). The Energy Policy Act of 1992 added four more categories: showerheads, faucets, water closets (toilets) and urinals. The rules establish maximum permissible water usage rates for the products. See 42 U.S.C.A. ß6292(a)(15)-(18) (1996). See also 16 CFR Part 305 (1996).

See 48 CFR 23.203 (1996).

AMCCC-G POINT PAPER 5 November 1997

SUBJECT: Ethical Issues Created by Contractors in the Workplace

PURPOSE: Provide information about ethical issues created by contractor employees working in the Federal workplace.

FACTS:

(Contractor employees are indeed different from Federal employees, even those contractor employees who work on a daily basis in and around the Federal workplace. One major difference is that the conflicts of interest criminal laws do not apply to contractor employees (except for the bribery statute), nor do the Standards of Ethical Conduct for Employees of the Executive Branch or the DoD Joint Ethics Regulation apply to them.

(Contractor employees and their workspace should be clearly identified to ensure that Federal employees and the public know that they are not Federal employees to avoid inadvertent unethical conduct in addition to other issues, such as illegal personal services, claims for services provided beyond that required by the contract, and misunderstandings about fiduciary responsibilities.

(GIFTS. Contractors and their employees are "outside resources." They should not be solicited for contributions to gifts to departing or retiring Army employees. The rules governing gifts between Army employees and those offered by a contractor or its employees to an Army employee are very different. In an appropriate case, an Army employee may accept a $300 framed print from the employees in his or her organization, but could never accept that gift from the contractor employees who support his or her organization. It is permissible for employees to accept meals and entertainment in a subordinateís home; however, in many cases, this would not be appropriate if the invitation is from a contractor employee.

(EMPLOYMENT OVERTURES. Any discussion about future employment between an Army employee and a contractor employee, whoever initiates it, might require special reports depending on the situation. For sure, if the Army employee initiates the inquiry or wishes to pursue it, the Army employee is automatically disqualified from participating in official matters affecting the contractor and must issue a written notice of this disqualification.

(RELATIONSHIPS BETWEEN FEDERAL AND CONTRACTOR EMPLOYEES. It is common for varying degree of relationships to develop between and among employees in the workplace. The relationships run the gamut from friendly acquaintances to good friends to close personal friendships to marriage. When these relationships begin to develop between Federal and contractor employees, the Federal employees and their supervisors need to be alert to issues and appearances.

((If the relationship is with a Federal employee who has nothing to do with the contract or the contractor employee, the only concern might be for the protection of "inside information."

((If the relationship is with a Federal employee who has responsibilities involving the contract or the work being performed by the contractor employee, there will be appearances of conflicts of interest that must be resolved; these appearances often

disqualify the Federal employee from participating in the official matters affecting the contractor.

((If the relationship between the Federal and contractor employee results in marriage, the financial interests of the spouse are imputed to the Federal employee and any actual or apparent conflicts of interest that are created must be resolved.

(PROTECTION OF INFORMATION. Numerous statutes protect the release of procurement information, trade secrets, other confidential information and classified information. In addition, the Standards of Ethical Conduct prohibit using, or allowing the use of, nonpublic information for private interests. As Army employees, we must be very circumspect as to whom we release nonpublic information (i.e., need to know). But, we must be particularly vigilant when we are discussing sensitive matters with and around contractor employees.

(RELATED ISSUES.

((Contractors often provide us with "limited rights" information, which cannot be release outside the Government without their consent. Support contractor employees are "outside the Government." Unauthorized release of such data could violate 18 U.S.C. ß 1905, which makes it a crime to improperly release trade secrets, processes, and other confidential information.

((Use of support contractors with respect to a future requirement can result in limiting competition for that requirement. The support contractor might be precluded from competing for the requirement because of an organizational conflict of interest.

(When any of these or other ethical issues, or the related issues arise, employees and their supervisors should seek advice and counsel from their supporting legal office.

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Apri1 14, 1995

GUIDELINES ON 18 U.S.C. § 1913

The Anti-Lobbying Act, 18 U.S.C. § 1913, prohibits officers and employees of the executive branch from engaging in certain forms of lobbying. If applied according to its literal terms, section 1913 would have extraordinary breadth, and it has long been recognized that the statute, if so applied, might be unconstitutional. The Office of Legal Counsel teas interpreted the statute in light of its underlying purpose "to restrict the use of appropriated funds for large-scale, high-expenditure campaigns specifically urging private recipients to contact Members of Congress about pending legislative matters on behalf of an Administration position. Memorandum for Dick Thornburgh, Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts," 13 Op. O.L.C. 361, 365 (1989) (prelim. print) (citation and footnote omitted) (~1989 Barr Opinions). Although there has never been a criminal prosecution under the Act since its adoption in 1919, the Criminal Division and its Public Integrity Section have frequently construed the Act in the context of particular referrals. The principles that the Criminal Division has developed over time provide guidance to the meaning of the statute that is necessary in order for the Act to provide reasonably ascertainable guidance to those to whom it applies.

Section A below describes officials whose lobbying activities are not inhibited by the Anti-Lobbying Act. Section B describes the kind of lobbying permitted under the Act. Section C describes the kind of lobbying prohibited by the Act. Section D describes a further restriction that agencies may wish to observe, although they are not required to do so under the Act. Section E describes additional prohibitions imposed by typical "publicity or propaganda riders, as interpreted by the Comptroller General, although identifying the precise restrictions, if any, applicable to any particular agency requires an examination of that agency's appropriations act.

A. The Department of Justice consistently has construed the Anti-Lobbying Act as not limiting the lobbying activities personally undertaken by the President, his aides and assistants within the Executive Office of the President, the Vice President, cabinet members within their areas of responsibility, and other Senate-confirmed officials appointed by the President within their areas of responsibility.

B. Under the Anti-Lobbying Act, government employees MAY:

- o communicate directly with Members of Congress and their staffs in support of Administration or department positions. The Act does not apply to such direct communications.

- o communicate with the public through public speeches, appearances and published writings to support Administration positions -- including using such public fore to call on the public to contact Members of Congress in support of or opposition to legislation.

- o communicate privately with members of the public to inform them of Administration positions and to promote those positions -- but only to the extent that such communications do not contravene the limitations listed in Section C below.

- o lobby Congress or the public (without any restriction imposed by the Anti-Lobbying Act) to support Administration positions on nominations, treaties, or any non-legislative, nonappropriations issue. The Act applies only to lobbying with deject to legislation or appropriations.

C. Under the Anti-Lobbying Act, government employees MAY NOT:

- o engage in substantial "grass roots" lobbying campaigns of telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress, in support of or opposition to legislation. Grass roots lobbying does not include communication with the public through public speeches, appearances, or writings. Although the 1989 Barr Opinion does not define the meaning of "substantial" grass roots campaigns, the opinion notes that the 1919 legislative history cites an expenditure of $7500 -- roughly equivalent to $50,000 in 1989 -- for a campaign of letter-writing urging recipients to contact Congress.

D. Although not required by the Anti-Lobbying Act, agencies may wish to observe a more general restriction with reject to officials other than those listed in Section A:

- o against expressly urging citizens to contact Congress in support of or opposition to legislation. As Sections B and C taken together indicate, the Anti-Lobbying Act does not forbid

government employees from urging citizens to contact Members of Congress on behalf of an Administration position, except in the context of a grass roots campaign. Nevertheless, the Comptroller General, following his understanding of the Department of Justice's historical interpretation of the Act before the 1989 Barr Opinion, has construed the restriction as being triggered by explicit requests for citizens to contact their representatives in support of or opposition to legislation. Given the Comptroller General's interpretation, and given the difficulty of predicting what may be perceived as a grass roots campaign in a particular context, agencies may wish to err on the side of caution, by refraining from including in their communications with private citizens any requests to contact Members of Congress in support of or opposition to legislation.

E. The Office of Legal Counsel's published opinions do not set out a detailed, independent analysis of "publicity or propaganda" riders contained in the appropriations acts of some agencies. The Comptroller General has suggested that, under such riders, government employees also MAY NOT (1) provide administrative support for the lobbying activities of private organizations, (2) prepare editorials or other communications that will be disseminated without an accurate disclosure of the government's role in their origin, and (3) appeal to members of the public to contact their elected representatives in support of or opposition to proposals before Congress.

"ANTI-LOBBYING ACT DO'S AND DON 'TS"

DOL employees may:

- o Contact Members of Congress directly on matters of concern to the Department, including pending legislation.
- o Speak about the Labor Department's legislative positions in meetings with individuals or groups, at public forums, at news conferences and during news interviews.
- o Distribute normal press releases, DOL officials' speeches, fact sheets, and other informational materials unless the distribution includes a request or suggestion that the person contact the Congress.
- o Have regular contact with non-governmental organizations which may or may not have among their purposes lobbying Members of Congress or attempting to influence the general public to lobby the Congress.
- o Provide to non-governmental organizations limited copies of DOL documents (such as press releases, letters, reprints of public officials' speeches, and fact sheets) that are otherwise available for public distribution. Any decision to reproduce, publish or distribute such material must be left entirely to the judgment of the outside organization.

DOL employees may not:

- o Produce written or electronic communications for distribution which suggest that members of the public lobby Members of Congress.
- o Give a speech asking the recipients to contact their Senators and Representatives in support or opposition to a legislative proposal.
- o Assume responsibilities for or direct the operation of an outside organization which is engaged in grass roots lobbying (encouraging people to write to Congress).
- o Suggest that an outside organization activate its membership to contact Members of Congress in relation to a legislative proposal.
- o Provide multiple copies of materials to be distributed by an outside organization which is engaged in grass roots lobbying.
- o Share non-public information with an outside organization engaged in a lobbying campaign.
- o Gather information or produce materials specifically for such an organization which cannot properly or would not ordinarily be gathered or produced as part of the DOL official's regular work.

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18 AUG 1997

MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
JUDGE ADVOCATES GENERAL OF THE MILITARY DEPARTMENTS
GENERAL COUNSELS OF THE DEFENSE AGENCIES
COUNSEL FOR THE COMMANDANT OF THE MARIE CORPS
STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS
LEGAL COUNSEL TO THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Guidance on Analyzing Invitations to DoD Officials To Participate in Fundraising Activities and to Accept Gifts Related to Events

DoD officials often receive invitations from various organizations requesting their participation in certain events, such as serving as chairs or honorary chairs, attending, or making speeches. These invitations are further complicated when the events are designed to raise funds on behalf of the organization or to benefit a charitable entity. This memorandum provides guidance on analyzing those invitations under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635,'and the Joint Ethics Regulation (JER), DoD 5500.7-R It also discusses the rules governing the acceptance of free attendance at events for which there are normally charges.

Official Capacity

Under 5 C.F.R § 2635.808, a DoD official, unless authorized, may not "participate in fundraising in an official capacity." Fundraising includes "active and visible participation in the promotion, production, or presentation of" an event at which any portion of the cost may be taken as a charitable tax deduction. Participation includes serving as an honorary chairperson, sitting at a head table, or standing in a reception line. In accordance with Section 3-210 of the JER, a DoD official may not "officially endorse or appear to endorse" fundraising for any nonFederal organization, with certain specified exceptions. Under Section 3-209 of the JER, DoD officials may not officially state or imply, or use their titles or positions to suggest, an official endorsement or preferential treatment of any non-Federal organization or event, with the exception of those in section 3-210: Combined Federal Campaign; emergency and disaster appeals approved by the Office of Personnel Management; Army Emergency Relief; NavyMarine Corps Relief Society, Air Force Assistance Fund; and "other organizations composed primarily of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members of their dependents when approved by the head of the DoD Component command or organization."

Under these regulations, a DoD official should decline an invitation to serve, in his official capacity, as the chairperson or honorary chairperson of a fundraising event for an organization that is not authorized under Section 3-210 of the JEW Serving in such a position clearly constitutes fundraising, which is not allowed under the regulations. These invitations seek the visibility ofthe DoD official and his name to help solicit attendance and money for the event. Participating under these circumstances would also constitute an unauthorized endorsement of the organization's fundraising.

There are only two exceptions under which a DoD employee could be associated with a fundraising event in her official capacity. First, under 5 C.F.R § 2635.808(a)(2), an employee may merely attend a fundraising event as long as the organization does not use the fact of her attendance to promote the event.

Second, under 5 C.F.R § 2635.808(a)(2) ~ (3), an employee may deliver an official speech, which is one given in an official capacity on a subject matter that relates to her official duties. This may include the employee's own official duties; the responsibilities, programs, or operations of the agency; or matters of Administration policy on which the employee is authorized to speak. The employee may not request donations or any other support for the organization. Further, the employee's agency must first determine that the event provides an appropriate forum for the dissemination of the information.

DoD allows the heads of DoD Component commands or organizations to make that determination. Section 3-211 of the JER and DoD Directive 5410.18 set out the conditions under which they may make that determination. All of the conditions of section 3-211 must be met before DoD may provide a speaker. It is DoD policy that official speeches at fundraisers are generally disfavored, but may be given if a more appropriate forum is not available and the DoD information needs to be disseminated within a certain time period. The emphasis is whether DoD needs to meet certain public affairs goals and whether the forum in question is the most appropriate to accomplish those goals. A review ofthe conditions follows.

The speech and its preparation may not interfere with the performance of official duties or detract from readiness. DoD community relations or other legitimate DoD public affairs interests must be served by the speech. These include increasing understanding of U.S. defense posture and capabilities, fostering and sustaining good relations with elements of the public, increasing public awareness and understanding ofthe Military Services, and supporting the personnel recruiting ofthe Services. The event must also be of interest and benefit to the local civilian community as well as DoD.

The organization and the event must be appropriate for association with DoD and the speech. For example, nonpartisan events open to the public are usually of common interest and benefit to the general public. Events attended only by invitation; however, may be considered only where a broad cross section ofthe community is represented, such as an annual convention of an association, or where the organization is particularly connected with the DoD. If

organizations have a narrow membership base or interest, the DoD support must benefit the community, not the sponsoring organization.

The deciding of ficial must also be able and willing to provide the same support to comparable events sponsored by similar organizations. For example, if the Secretary of a Military Dep~l`"ent determines that a fundraising annual dinner of a public policy organization with a conservative approach is appropriate for him to make an official speech, then he must be willing to make an of ficial speech at a fundraising annual dinner of a public policy organization with a liberal approach. The same support is not provided if a lower-level official makes a speech at the second event. There are many civic, social, and fraternal organizations, including thirteen organizations that are listed at 32 U.S.C. § 508, that may be considered similar organizations.

DoD should not provide a speaker at an event that charges a fee in excess of the reasonable costs of sponsoring the event. This limitation applies to commercial activities making a profit and fundraising activities. The only exception to speaking at a profit-making or fundraising event is if DoD support is incidental to the event, in accordance with public affairs guidance. For example, if the event is an annual dinner, which is going to be held with or without a DoD speaker, then DoD support is probably incidental to the event. DoD participation must be carefully evaluated on a case-by-case basis.

Whenever the head of a DoD Component command or organization determines that a fundraising event is an appropriate -forum, certain precautions must be taken to prevent the appearance that an official's participation is an endorsement of the fundraising event. First, the official may not request donations or other support for the sponsoring organization. Second, his attendance may not be used for promotion of the event. Therefore, any sponsoring organization should be advised that the official may not appear to endorse the organization or its fundraising activities. The organization may certainly include in its invitation package the fact that the DoD official will make an official speech, but must be careful not to use that fact to promote attendance. DoD Public Affairs offices, in consultation with Ethics Counselors, should try to advise on appropriate language and request the opportunity to review and comment on the wording.

As an example of applying the analysis discussed above, to accept an invitation to speak at the Mom, Apple Pie, and DoD Supporter (MAPADS) annual dinner fundraiser, the head of a DoD Component command or organization must make the following determi-nations. First, she must determine that there are specific DoD community relations interests that may be satisfied by a speech to the MAPADS. Second, because the event is attended by invitation, she must determine whether the MAPADS attendance represents a sufficiently broad cross section of its representative interest group. Alternatively, she may determine that the MAPADS is particularly connected with a message that DoD needs to convey. DoD must also determine that other

appropriate fore, which do not involve fundraising, are not available at the time. Ilini, she must determine that she is willing and able to address the annual dinner fundraiser of a similar organization that does not actively support DoD. The point here is that DoD may not give or

appear to give preferential treatment to any particular type of group. Finally, she must determine that the presence of DoD, or the presence of a specific DoD speaker, is not one of the primary attractions of the event. In other words, should DoD presence, or the presence of a specific speaker, be canceled, the event will continue. If this determination is madej then any speech by a DoD official would be incidental to the event. If all these determinations are made, the precautions discussed on page 3 must be observed.

Personal Capacity

There is also a question of whether very senior officials may endorse, fundraise for, or assist an orgaruzation in their personal capacities. These officials are the Secretary of Defense, the Deputy Secretary of Defense, the Secretaries ofthe Military Departments, and the Chairman and members of the Joint Chiefs of Staff. In 1992, the Standards of Ethical Conduct for Employees of the Executive Branch were published. It was the Office of Government Ethics' (OGE's) determination that it is theoretically possible for senior officials to have a personal capacity. It is DoD's position that, for these officials, the capacity is minimal, especially in the area of fundraising, and should be used only on rare occasions.

The determination of personal capacity would depend on the specific circumstances, including the office of the employee, how much the public identifies the employee with his office, the notoriety of the employee, and past history of association between the employee in his personal capacity and the organization. If the official previously supported something in his personal capacity, it would probably be permissible to continue the personal support. For example, if he had supported his local animal shelter in his personal capacity for the past 10 years, he could probably continue to offer the same type of support in his personal capacity. However, if he now receives for the first time a request from a national humane society for his support, he does not have the kind of historical relationship that could support a personal capacity. Thus, fundraising in a personal capacity would be precluded.

Accordingly, attempting to serve as Honorary Chairperson of the annual fundraising dinner of a national humane society in a personal capacity would be impermissible. Under circumstances where there is no history of a strong association in a personal capacity and where a public organization is requesting support at a highly visible forum, it is virtually impossible to avoid the appearance or implication of an official endorsement. Therefore, we recommend that DoD official not accept such an offer in his personal capacity.

If he were to do so, however, there are other restrictions that must be observed. Under the OGE standards, at 5 C.F.R § 2635.808(c), the DoD official may not personally solicit from

subordinates. He may also not personally solicit from a prohibited source, which includes, at a minimum, every contractor listed on the DoD Contractors List for the most recent fiscal year. Personal solicitation includes using, or letting others use, his name in correspondence. It does not include mass-produced correspondence addressed to a group of many persons, as long as the solicitation is not targeted at subordinates or prohibited sources.

If the service requires a speech, the official could not give a speech expressing official DoD policy; however, he could use DoD speechwriters if the organization could be considered a non-profit professional association or learned society. Under section 3-300b. ofthe JER, administrative support services may be used in a limited manner to prepare speeches for presentation at such organizations when related toPoD "functions, management or mission," DoD can derive a benefit, such as improved public confidence from the recognition, and the use does not interfere with performance of official DoD duties. If the organization is not such an association or society, DoD personnel may not be used to assist the official.

A DoD official may not use, or permit others to use, his official title or position to assist the fundraising. Terms of address, such as "The Honorable" or "General" may be used, although this use weakens the attempt to divorce the speech from the employee's official capacity. Finally, he must do everything possible to eliminate the appearance of an official endorsement.

Gifts

Another issue that may arise is whether a DoD official may accept gifts of an invitation to an event, which may include lodging, meals, and entertainment, and of any related transportation in either his official or personal capacity. Under section 3-200 of the JER, a DoD official may attend a "meeting, conference, seminar or similar event" in his official DoD capacity if his Agency Designee determines that there is a legitimate Federal Government purpose in accordance with training or gathering information of value to DoD. If that determination is made, the Federal Government may pay all related expenses. Under 31 U.S.C. § 1353, DoD may then accept travel, subsistence, and related expenses from a non-Federal source for attendance of the official at a meeting or similar function relating to his official duties. Therefore, if the official makes the determination, he may accept both gifts in his official capacity. If the gift of travel exceeds $250, it must be reported to the Director of OGE through the DoD Component's ethics office.

Under 5 C.F.R Part 2635, employees may not accept in their personal capacities gifts from a prohibited source or offered because of the employee's official position, unless an exception applies. Determining whether a donor is a prohibited source should be fairly easy. Determining whether the official is being offered the gifts due to his official position may be more difficult.

In a situation where the potential donor is not a prohibited source, the ethics official needs to examine closely the circumstances of the offered gift. If the official were invited for several

years prior to his current official position, it would not appear likely that the invitation this year was offered because of his official position. If the official were not invited in the past, however, the gift is more likely based on his current official position. Two exceptions may apply. Under 5 C.F.R § 2635.204(h), the official may accept food and entertainment from a non-prohibited source if no fee is charged to any person in attendance. Under 5 (~.F.R § 2635.204(b), the official may also accept a gift if it is clear that the motivation is a personal friendship rather than his position. Factors to consider are the history of the relationship and whether the friend personally pays for the gift. Where a gift is paid by an organization, however, rather than a personal friend, OGE considers that it is a business relationship, not a personal friendship, that is the primary motivation.

If you have any questions about application of this guidance to a particular situation, please contact the DoD Standards of Conduct Office at (703) 695-3422 or 697-5305.

ith A. Miller